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The *EBR* Litigation Rights: Six Years of Experience

A Review of the Decisions and Cases, 1995-2000

Prepared by the Environmental Commissioner of Ontario

April 2000

A Background Paper for the *EBR* Litigation Rights Workshop May 25, 2000

This paper has been prepared for a workshop being hosted by the Environmental Commissioner of Ontario (ECO), to be held May 25, 2000 at Queen's Park. The purpose of the paper is to provide background information and promote discussion. The paper may be revised at a later date to reflect the comments advanced at the workshop. For this reason, it is still considered a working draft. It should not be cited or referenced without contacting the ECO beforehand. Any comments or questions regarding this paper should be directed to Legal staff at the ECO.

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Litigation Rights and the *EBR*: Six Years of Experience[1]

A Review of key *EBR* Cases, 1995-2000

1. Third Party Appeals Under the *Environmental Bill of Rights*

The *EBR* allows third parties without traditional appeal rights to appeal instrument decisions. To launch a leave to appeal application, third parties must apply to the appeal body within 15 days of notice of the decision being posted on the Environmental Registry. The appeal body is the one which would hear a traditional appeal of that instrument.[2] Because ministry decision-makers are required to hold public hearings on Class III instruments before they are approved, leave to appeal applications can be brought only in relation to Class I and Class II instruments under the *EBR*.

Leave to appeal will not be granted to a third party applicant by an appeal board unless the person applying has a direct interest and can meet the following two-pronged test set out in section 41 of the *EBR*:

1. No reasonable person (i.e., ministry decision-maker), having regard to the law and the relevant government policies, could have made that decision; and

2. the decision being appealed could result in significant harm to the environment.

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[1] This paper was prepared by David McRobert and other ECO legal staff with the assistance of Vic Zabala of Seneca College. Most of this material is based on the following papers: D. McRobert, "The Nuts, the Bolts and the Rest of the Machinery: A Guide to and Update on Ontario's *Environmental Bill of Rights*," Background Paper for **Environmental Law, Regulation and Management**, Canadian Institute Conference, King Edward Hotel, Toronto, May 25 & 26, 1998; and D. McRobert, "The Nuts and Bolts of Ontario's *Environmental Bill of Rights*: An Update," Background Paper for **Environmental Law, Regulation and Management**, Canadian Institute Conference, Hotel Plaza II, Toronto, October 28 & 29, 1996.

[2] For example, the appeal body for decisions on instruments under the *Environmental Protection Act* is the Environmental Appeal Board. The other appeal bodies under the *EBR* include the Mining and Lands Commissioner (appeals for *Mining Act* instruments issued by the Ministry of Northern Development and Mines and some MNR instruments), and the Ontario Municipal Board (appeals on *Aggregate Resources Act* instruments issued by MNR and *Planning Act* approvals issued by the Ministry of Municipal Affairs and Housing). The Technical Standards and Safety Authority created by MCCR has established an informal appeal process, but this is not a prescribed appeal process under the *EBR*.

As of April 30, 2000, the Environmental Appeal Board has decided 24 applications for leave to appeal.[3] (Thirty cases were filed; four were withdrawn and two were out of time.) In eight cases, leave was granted.

It should be kept in mind that more than 9,000 decisions made by the Ministry of the Environment since November 1994 have been subject to the leave to appeal provisions of the *EBR*. This means that the appeal rate is 0.33 per cent (30/9,000) or 3.3 out of a thousand decisions. This is a lower rate than many people had expected.

In the text below, we provide a brief summary of the grounds and outcomes for the appeals that have been launched to date.

Hunter

The first decision on a leave to appeal application was made by the Environmental Appeal Board in the case of Mr. Albert Hunter, Jr. from Northwestern Ontario. Mr. Hunter applied under the *EBR* for leave to appeal a decision of a Director of MOE to issue a certificate of approval (C of A) for the operation of eight air emission points at a wood product plant of OSBBC Ltd., a subsidiary of Boise Cascade, a large pulp and paper company. In this initial case for leave to appeal under the *EBR*, the Environmental Appeal Board balanced the competing interests of fairness to an unrepresented applicant and avoiding prejudice to the instrument holder.

In a decision released in July 1995, the Environmental Appeal Board found that Mr. Hunter passed the initial "direct interest" test because he was a neighbour who might potentially suffer adverse effects from the proposed facility's air emissions. The Board based its decision to turn down the application on the first aspect of the leave to appeal test — the reasonableness of the Director's decision. The Board was satisfied that the Director acted reasonably in applying standard ministry procedures to determine that emissions levels from the facility would be within acceptable levels set by regulation. Accordingly, it dismissed Mr. Hunter's leave to appeal application and made some interesting observations on the Registry and procedural issues related to leave to appeal applications.[4]

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[3] Since the Petro-Canada leave to appeal application involved appeals of two instruments, it is counted as two applications by the Environmental Commissioner of Ontario (ECO), although several individuals were requesting the appeals. The ECO is not including cases that were withdrawn before the board made a decision or those where the applicants were out of time see other Leave to Appeal (LTA) cases below.

[4] In establishing its procedures for leave to appeal applications in *Hunter*, the Board took a purposive view of its role under the *EBR*. Mr. Hunter raised concerns about the appropriateness of the Registry as a tool for public participation in the North, particularly where the minimum 30-day comment period is used. For example, members of the public in Northern or rural Ontario could have difficulty obtaining Registry information where they have to travel long distances to do

APT Environment

This application for leave to appeal was made on a decision by MOE to amend a certificate of approval for sewage works granted to Uniroyal Chemical Limited in Elmira. The amendment proposed the additional containment and treatment of groundwater from the top beds of an aquifer on Uniroyal's property located west of Canagaguige Creek. An environmental group based in Elmira, Assuring Protection for Tomorrow's Environment (APT Environment), appealed the decision on the grounds that it was unreasonable, that it did not provide adequate protection to the creek because it would not prevent the migration of hazardous chemicals into the creek, and that the certificate of approval as drafted would result in significant harm to the natural environment.

In reasons issued in early 1996, the Appeal Board found that the change to the certificate was not a Class II instrument under Regulation 681/94 under the *EBR*, and thus concluded that APT Environment was not entitled to bring a leave application. The Board also found that the instrument was not unreasonable in light of the intent by the MOE to control the release of contaminants from the Uniroyal site.

Grand River Bio-Region Association

In the third leave application, the Grand River Bio-Region Association (GRBRA) sought leave to appeal an amendment to the certificate of approval issued to Safety-Kleen Canada, Inc., a company that has owned and operated a Used Oil Re-Refinery plant in Breslau since 1968. Safety-Kleen had obtained the approval to increase the processing capacity of the plant following a public hearing before the Environmental Assessment (EA) Board in 1994 and 1995. The GRBRA sought to appeal the ministry's decision on the amendment on the grounds that the EA Board's was not "a hearing with full public participation."

In reasons issued in early 1996, the Appeal Board found that the change to the certificate was not a Class I or a Class II instrument under Regulation 681/94 under the *EBR*, and the GRBRA was not entitled to bring a leave application. Indeed, the Appeal Board found that since a public hearing was held, section 26(2) of the *EBR* reclassifies the proposal as a Class III proposal under the *EBR*. The Appeal Board also stated that it has "no jurisdiction to review the actions of the EA Board."

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so. The Board noted that while the adequacy of the public consultation in this case did not bring the reasonableness of the Director's decision into question, there could be situations where the public notice is so inadequate that even if they met the minimum requirements under the *EBR*, they could make Director's decisions unreasonable and result in decisions that harm the environment.

Wetlands Preservation Group of West Carleton[5]

In March 1996, the Wetlands Preservation Group of West Carleton applied for leave to appeal the renewal of a permit to take water (PTTW) issued by MOE to Coopers & Lybrand (Trustee for R.J. Nicol (1975) Ltd.).

The ground for the application for leave to appeal was that the decision of the Ministry of the Environment to renew PTTW #90-P-4073 posed a reasonable risk of significant environmental harm. The applicant maintained that pesticides and fertilizers used in the maintenance of the golf course operated by the instrument holder were entering the shallow groundwater and the golf course drainage system, and were thereby entering the ecosystem of the Class I Constance Creek wetland.

In its decision and accompanying reasons released on May 9, 1996, the Environmental Appeal Board, the appellate body, denied leave to appeal in this case. The applicants' concerns were with the problem of discharge of chemical contaminants such as pesticides and fertilizers. The Board found that an appeal of a water taking permit, which deals with water quantity issues, was not the appropriate avenue to deal with the concerns raised by the applicants. Other instruments were available to the Director to address these problems. The Board suggested that the applicants could use other mechanisms under the *EBR* to address their concerns.

The Board also noted that the Registry notice for the permit had originally provided for a 60-day comment period, which was later reduced to 30 days. As a result, the applicants were by the respondent of losing status because they did not comment on the notice in a timely matter. The Board found that it was unreasonable to expect the applicants to have been rechecking the Registry to see if the time for comment had been changed.

Barker, Major, Kiers and Skipper ("Barker")[6]

The first successful third party leave to appeal application was granted by the Environmental Appeal Board in May 1996. Don Barker, John Major, Geert Kiers and Dennis Skipper ("the applicants") applied for leave to appeal a decision of the Ministry of Environment the to issue a certificate of approval to allow the receipt of waste at a waste disposal site in southwestern Ontario that had not operated since 1978.

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[5] *Wetlands Preservation Group of West Carleton* v. *Ontario (Director, Ministry of the Environment and Energy)* (1996), 18 C.E.L.R. (N.S.) 65 (Jackson).

[6] *Re: Barker* (1996), 18 C.E.L.R. (N.S.) 72 (Jackson).

In granting leave to appeal this decision, the Environmental Appeal Board concluded that the MOE Director may have acted unreasonably and that the Director's decision to permit the reopening of the site could result in significant harm to the environment.

In earlier decisions, the Board required the applicants to prove their cases on the "balance of probabilities." In the *Barker* decision, the Board decided to use a lesser standard of proof at the leave to appeal stage, rather than the higher standard of proof on a "balance of probabilities." The Board ruled that applicants for leave to appeal must prove a "*prima facie* case." That means the application must show "preliminary merits" or raise a "serious question." In this case, the Board concluded that the applicants had passed the lesser standard of proof and shown that their concerns had sufficient foundation to give them the right to pursue those concerns through the appeal process.

In November 1996, the applicants reached a settlement with the proponent, Cooke, the Township of Tilbury East and MOE. The settlement provided that: 1) MOE agrees to revoke Cooke's certificate of approval, and Cooke and the township agree not to appeal the revocation or seek compensation for the revocation; 2) the township will acquire from Cooke the 25-acre piece of land where past landfilling has occurred, and MOE will issue a Director's Order requiring the township to submit an appropriate site closure plan; and 3) Cooke will retain approximately 150 acres of agricultural lands, and MOE will issue a Director's Order requiring Cooke to identify the nature and location of waste on these lands and submit an appropriate cleanup plan.

The instruments required to carry out the agreement were posted on the Environmental Registry, and in mid-February 1997 the applicants withdrew their appeal.

Residents Against Co. Pollution Inc.: The Petro-Canada Leave Applications[7]

In June 1996, the EAB released its decision in an application for leave to appeal two instruments prescribed under the *EBR* — an *Environmental Protection Act* s. 9 air approval and an *Ontario Water Resources Act* s. 53 (1) sewage approval, both issued to Petro-Canada. Five separate individuals or groups appealed decisions on both instruments. The EAB addressed 15 separate issues in this matter.

The Board granted leave to appeal the air certificate of approval on two grounds:

1. It was unreasonable of the Director to issue an approval for which no application was made. The Director, in granting the certificate of approval, allowed more than what was requested in the original application, and provided for expansion of the Petro-Canada plant, instead of providing only for some new heaters. However, the Board allowed leave to appeal the certificate of approval portion only which related to SO_2 (sulphur dioxide) emissions, because evidence showed the facility's compliance with these to be marginal.

2. It was unreasonable of the Director to limit the retention time for keeping records of maintenance, repair, monitoring and recording activities related to the certificate of approval to two years, because this condition was applied as a generic, "boiler plate" provision, and the Director did not determine what was necessary to the public interest in this case, contrary to MOE policy.

In its decision, the EAB made a number of interesting comments related to the success of the *EBR*, the role of the Environmental Commissioner and difficulties found in the appeal process. In this case the Board also moved away from the balance of probabilities standard of proof used in earlier decisions, and followed the less stringent standard of proof for granting leave to appeal under the *EBR* used in the *Barker* decision, described above.

Board Notes that "*EBR* raises standard of protection"

The Board also noted in the Petro-Canada decision that the main value of the *EBR*'s appeal provisions is the opportunity it provides to Ontario residents to make submissions and have them considered by the Director in making a decision, rather than the right to obtain leave to appeal, because this is so difficult to obtain. The right to seek leave to appeal is useful primarily as a safeguard to ensure that Directors do give serious consideration to meritorious submissions. The Board stated that "judged by this criterion the process mandated by the *EBR* might be

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[7] *Re Residents Against Co. Pollution Inc.* (1996), 20 C.E.L.R. (N.S.) 97 (Ont. Env. App. Bd.).

considered a substantial success in this case.... the *EBR* raises the standard of protection accorded to the public" [emphasis added].[8]

The Board also commented that reviewing the adequacy of the public participation process is the Commissioner's function, and that the Board cannot address flaws in the public consultation process that do not bear directly on the correctness of the decision. The Board also noted that making orders reducing emissions from the existing facility is not the Director's duty under the current C of A process, and that such requests should be made to the Environmental Commissioner rather than to the Director or Board.

By this the Board appeared to be referring to the Application for Review process under the *EBR*, which allows two Ontario residents to apply for a review of a prescribed instrument, such as an existing certificate of approval for air.

The Board noted the problems that can be caused by the written hearing process under the *EBR*, and discussed the difficulties in meeting the *EBR*'s 30-day decision framework when thousands of pages of evidence must be sifted through. Other problems included vague and inappropriate answers from Petro-Canada and MOE, and that information became available to the Board and the applicants in stages.

In the initial stages of the hearing that commenced in August 1996, it appeared that the citizens groups and lawyers for the environmental groups were going to be out-manouvered by the lawyers for Petro-Canada.[9] However, the ENGOs did not concede defeat.

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[8] *Ibid*, p. 160.

[9] The leave applicants faced two opposing parties: the Legal Services Branch of MOE, whose role it was to defend the decision of the Director to grant the certificate of approval, and the instrument-holder, Petro-Canada, which was defending the terms of the certificate of approval. They guessed that the appeal would involve a hearing before the EAB that could last for months, with expert witnesses that would need to be examined and cross-examined by lawyers for the various parties to the application. Since the test for leave to appeal under the *EBR* is so stringent, lawyers for MOE and instrument-holders knew that they must take any appeal seriously, because appellants have a serious case to meet, in order to be granted leave to appeal. Frequently, respondents in an appeal resort to tactics that can stall a hearing and run up the applicants' legal bills.

Three of the five original applicants filed appeals of the certificate of approval with the EAB (the other applicants dropped out of the proceedings). Greenpeace joined forces with Sierra Legal Defence Fund (SLDF), a non-profit environmental advocacy organization that provides free legal services to citizens and groups with environmental concerns, and a citizens group applicant, Residents Against Company Pollution (RACP), hired a private law firm to represent it. One individual applicant continued to appear on her own behalf. Petro-Canada was represented by a large Toronto law firm.

In the time between the granting of leave to appeal and the commencement of the actual appeal hearing, the respondents brought seven procedural motions, each of which required

Indeed, Greenpeace hired an American expert from California to testify that Ontario's air pollution standards were outdated. This appears to have motivated the MOE and Petro-Canada to settle the case. On January 9, 1997, the parties announced that a settlement of the dispute had been reached.[10]

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appearances by counsel, and some of which required expert affidavit testimony. In addition, there was a huge amount of correspondence between all the lawyers, and some attempts at negotiating a settlement. These proceedings were extremely costly. Indeed, RACP ran out of money shortly after the hearing began and had to let their lawyers go. Some of the members of RACP continued to be present at the hearing, unrepresented by legal counsel, but were certainly not as effective as they had been with counsel. Luckily, Greenpeace was able to obtain funding from the Greenpeace Charitable Foundation to pay for the scientific research and detailed evidence necessary to support their case, since SLDF did not have a budget for this. One of the experts testifying for Greenpeace had to be flown in from California. He gave affidavit evidence on sulphur dioxide emissions that turned out to be crucial in the final terms of settlement between the parties.

The hearing itself began on November 28, 1996, and lasted 19 days, before the parties and the EAB finally agreed to a settlement. The hearing had been scheduled to continue 10 for more days, had it not settled. During the hearing, the EAB heard testimony from expert witnesses describing the potential environmental impacts of Petro-Canada's manufacturing processes.

[10] Among the terms of this settlement, Petro-Canada committed to do the following:

1. Make modifications to its facility to reduce sulphur dioxide (SO_2) emissions during normal operations by directing the Sour Water Stripper Overhead through the Sulphur Recovery Unit (SRU). These modifications will mean that emissions from the SRU stack are between 20 to 65 grams per second, and that the SO_2 concentration at a point of impingement is 158 micrograms per cubic metre or less.This level will be significantly below the regulatory limit of 830 micrograms per cubic metre.

2. Restrict the burning of bunker oil as fuel for the boilers in the existing facility; the sulphur level of the oil not exceed 1.75%.

3. Control and minimize SO_2 emissions during abnormal operating conditions by developing procedures for the timely correction of upsets that lead to the discharge of SO_2 into the environment, and install an alarm to indicate SO_2 concentrations in excess of 158 micrograms per cubic metre.

4. Report on the status of SO_2 emission controls to the Public Liaison Committee.

5. Provide $250,000 in funding for research into airshed management.

Landfill Advisory Committee and T. Haagsma K & E Blackwell Road Landfill Site

This leave application involved a proposal by Philip Environmental Inc. for the use and operation of an existing 4.58 acre waste processing site to upgrade the existing process of handling hazardous waste class 143. The processes to be used include agglomeration and stabilization. Waste materials stored on site would not exceed the current limit of 20,000 tonnes. Processed materials would be recycled or disposed as non-hazardous wastes upon meeting criteria established by the MOE. This site would serve all of Ontario.

T. Haagsma of the Landfill Advisory Committee for the K&E Blackwell Road Landfill Site sought leave to appeal the MOE decision to allow the company to treat hazardous waste, Electric Arc Furnace Dust ("EAF dust"), and dispose of it as non-hazardous waste at the K&E Blackwell Road Landfill Site. Condition 60(1) required Philip to process the waste in accordance with certain documents. Condition 60(2) prohibited Philip from disposing of more than 110,000 tonnes of processed EAF dust.

The grounds for appeal were the following: 1) there was inadequate information available to the Landfill Advisory Committee about the processing of the EAF dust from a hazardous waste to a non-hazardous waste; 2) there was concern about groundwater contamination from the release of the heavy metals from the processed EAF dust due to the porous soil at the landfill site; 3) there was inadequate communication with the residential neighbours surrounding the landfill; 4) this waste represented a higher risk to the residential neighbours surrounding the landfill; and 5) this landfill might not be appropriate for such high risk material.

The Environmental Appeal Board denied leave to appeal in this case. The Board found that the applicant, Landfill Advisory Committee for the K&E Blackwell Road Landfill Site, was given two opportunities to initiate a review by an outside consultant of the plans of the proponent to resume depositing stabilized Electric Arc Furnace Dust at the landfill site, but failed to institute the review process to which it was entitled. The Board therefore found that the MOE Director had not acted in an unreasonable manner in this regard.

The Board also found that the Director had taken reasonable measures to ensure that all risks to the environment related to the deposit of EAF Dust at the site had been adequately addressed. Having found that the Director had not acted unreasonably, the Board found there was no need to consider whether LAC had raised a serious question about whether the Director's decision could result in significant harm to the environment. In its decision, the EAB said that the leave applicant "will normally have to provide expert scientific or technical evidence to support its request for leave to appeal." There may be cases where the evidence of ordinary people is sufficient to persuade the Board, but this was not an example of such a case.

Northwatch, #1

In February 1996, MOE issued a C of A to Harbour Re-mediation and Transfer Inc. for a project involving the shipment of treated sewage sludge ("biosolids") to northern Ontario. Northwatch, an environmental group based in North Bay, sought leave to appeal on a number of grounds. Northwatch claimed that this approval should be deferred and considered jointly with the pending proposal to dispose of the biosolid wastes at Falconbridge Mines, as these approvals were two stages of a single project. The applicant had the following concerns about the project: the project had not been given adequate review; biosolids were not an appropriate cover for tailings, given their toxic constituents; there would be adverse environmental impacts as a result of the project; the application of the biosolids would not act as an effective oxygen barrier to reduce acid mine drainage, which was the stated purpose of the project; the project would produce considerable greenhouse gases; and there would be negative policy implications in the approval of long distance rail haul of a waste product. Northwatch also stated that the MOE had not responded in a satisfactory manner to its concerns.

An order indicating that leave to appeal had been denied was issued April 2, 1996. Reasons for the decision were issued by the Environmental Appeal Board on August 16, 1996.

In its decision, the Environmental Appeal Board found that Northwatch, an unincorporated association, was a "person" within the meaning of s. 38 of the *EBR*, for the purposes of applying for leave to appeal the Director's decision in this case.[11] The Board also found that Northwatch had an interest in the Director's decision, as groups like Northwatch provide an effective voice in environmental matters in the more sparsely populated North.

The Board decided that the failure of Northwatch to provide notice to the instrument holder, Harbour Re-mediation and Transfer Inc. (HRT), and another interested party, Falconbridge, did not remove its jurisdiction to hear the matter. The appropriate remedy instead was to provide notice to these interested parties and allow them an opportunity to be heard.

The Board did not grant leave to appeal to Northwatch. It found that Northwatch had not shown that the Director's decision not to provide an equivalent opportunity to comment and seek leave to appeal the decision on the pending proposal to dispose biosolid wastes at Falconbridge Mines was so unreasonable that leave to appeal should be granted. This relief was not within the authority of the Director, and therefore was not unreasonable. In addition, the Board found that the wish of Northwatch to have the approval to HRT deferred and considered jointly with the application to dispose the biosolid wastes at Falconbridge Mines was effectively granted.

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[11] The Board noted that the context of s. 38 of the *EBR* requires an interpretation that includes unincorporated associations in the meaning of person, in order to fulfil the purposes of the *EBR* and give meaning to the provision.

In an interesting subsequent twist, MOE eventually posted the related application by Falconbridge for approvals related to this project as an exception to the public participation processes under the *EBR* on the basis that an EAB hearing already had been held because of the Northwatch leave application. As a result, additional public participation opportunities promised to the EAB by the ministry at the Northwatch leave hearing were not provided.

Carruthers, Lovekin and Rohde

In the summer of 1996, Betty Carruthers, Rick Lovekin and Bernie Rohde applied for leave to appeal in order to appeal the decision of MOE to amend the County of Northumberland's provisional certificate of approval for its waste processing site. This amendment changed the existing three-stream waste operation to a two-stream waste operation.

The applicants cited a number of grounds for leave to appeal, including their allegation that it was contradictory for the site to be used as a demonstration project, as required by Condition No. 1 to the amended provisional certificate of approval, while being operated in accordance with the County's application and supporting information. The applicants believed that the two-stream waste operation could result in a higher landfill disposal rate and therefore greater harm to the environment from landfill.

An order indicating that leave to appeal had been denied was issued August 1, 1996. Reasons for the decision were issued by the Environmental Appeal Board on February 7, 1997. In its reasons, the Board found that the applicants had an interest in the decision, as residents of the county where the system was located and as people who had attended public hearings on the matter. However, the Board ruled that the applicants failed to provide any evidence that the Director's actions were unreasonable or that significant harm to the environment would result from the amendment to the certificate of approval.

During an oral hearing, the applicants admitted that the Director's issuance of the amendment was not an unreasonable action. The Board ruled that the implementation by the County of Northumberland of a two-stream waste processing system would not result in significant harm to the environment. The Board also noted that the County has agreed to incorporate some of the applicants' suggestions into the operational procedures for the facility.

The Rickers Application

In this case, the applicants, Kenneth and Ethel Ricker, sought leave to appeal an MOE decision to grant a PTTW to Dunnville Rock Products Ltd. (DRP) for the purposes of quarry dewatering (i.e., pumping water out of the quarry).

The applicants, who were represented by two lawyers from Canadian Environmental Law

Association (CELA), own residential property near the quarry operated by DRP and rely on well water for drinking and domestic uses. The dewatering activity is necessary to allow the company to operate its equipment and remove aggregate material.

The Rickers maintained that the decision of the Director to issue a new PTTW was unreasonable because the Director did not consider relevant environmental statutes and failed to impose conditions to ensure that the objectives of MOE's Water Management Goals, Policies, Objectives and Implementation Procedures were met. The applicants also argued that the permit would interfere with the applicants' interest in water, the Director did not consider DRP's non-compliance with previous instruments and the information on DRP's Aquifier and Water Management Strategy available to the Director was inadequate.

The Rickers also claimed that the Director's decision could result in significant harm to the environment through interference with the use of the applicants' well and wells of neighbours, damage to animal life, and damage to the property of the applicants.

In its September 5, 1997 decision, the Environmental Appeal Board granted the Rickers leave to appeal the PTTW on two issues:

1. whether there were changes in the terms and conditions of the permit that could improve compliance by DRP; and

2. whether there should have been an expiry date on the permit to take water.

On the first ground, the applicants questioned why the Ministry of the Environment had not taken escalating enforcement action against DRP, although violations of conditions of previous permits had been noted in a report on DRP by MOE's Investigations and Enforcement Branch (IEB). The Board refused to examine whether the Director or the IEB has been or is currently acting reasonably in its enforcement actions, since the Board's judgement under a request for leave to appeal is whether the Director acted reasonably when issuing the permit. The Board questioned whether there were new terms and conditions that the Director could have added to ensure compliance.

The second successful ground involved the failure of the Director to place an expiry date on the new permit to take water. The previous permits issued to DRP had expiry dates on them. The Director stated that "it is now standard practice for the Ministry to issue permits without renewal dates," but using the Environmental Registry, the applicants produced evidence of seven permits to take water issued in March and April, 1997 which were posted on the Registry at roughly the same time as the DRP approval. Six of these permits had expiry dates. The Board accepted the applicants' argument that the Director may have acted unreasonably by not putting an expiry date on the PTTW. The Board then found that the decision to issue a permit to take water to DRP could result in significant harm to the environment.

The appeal hearing on this case was scheduled to begin in mid-1998 but then the parties sought adjournments to allow for additional testing work to be undertaken. In early 2000, the Rickers decided to withdraw their case.

The Knowles and Morris Application

George Knowles and Eugene Morris sought leave to appeal of the MOE decision to grant a C of A for a waste disposal site (processing) to Aaroc Aggregates Ltd (Aaroc). The C of A allows Aaroc to receive a maximum of 1,500 tonnes of construction and demolition waste daily and process this waste for recycling. The maximum amount of waste stored on the site would be 100,000 tonnes. The site is also an existing aggregate operation and is located on top of part of the Westminster/West Oakes aquifer in Middlesex County just outside London, Ontario.

Knowles and Morris both live on separate residential properties within 1.6 km of the site for which the approval was granted and rely on well water from the Westminster/West Oakes aquifer for drinking and domestic uses.

In their application, the applicants put forth 13 grounds on which they believed the Director acted unreasonably and seven reasons they believed the environment would suffer significant impact. They stated that the decision of the Director to issue a new C of A was unreasonable because the municipal zoning for the site does not permit the operation of a waste recycling facility, the site was previously operated without a C of A, and it was not reasonable to issue an approval to a company with a history of contraventions of provincial environmental laws. The applicants also noted that their concerns about the groundwater aquifer which underlies the site and surrounding area were not considered by the Director, the MOE's hydrogeologist was not consulted to assess potential impacts on the aquifer, and the need for surface water protection was not considered prior to granting the approval. The applicants further claimed that the Director's decision could result in significant harm to the environment, specifically the Westminister/West Oakes aquifer, and could have nuisance impacts on residents of the area surrounding the site.

In its reply to the application, Aaroc stated that the approval would allow it to mix construction and demolition waste with the limited gravel resources available at the site, allowing Aaroc to conserve gravel and reducing the amount of gravel that needs to be removed from the site. The company also contended that "there is no significant nuisance associated with the operation."

In a decision released in early October 1997, the Environmental Appeal Board denied leave to appeal in this case. The Board found that the applicants succeeded in showing good reason to believe that the Director acted unreasonably on one of the grounds alleged -- inadequate consideration of groundwater and surface water issues.

However, the Environmental Appeal Board found that the applicants failed to show that the Director's decision could result in significant harm to the environment. Therefore, the application for leave to appeal was denied.

Hannah, Sarich and Lemieux

In August 1998, four separate applicants living in Sault St. Marie (Roger Hannah, Laura Wheatley, Kathy Lemieux and Walter Sarich) sought leave to appeal a Ministry of the Environment decision to grant a C of A to a company called Agri-bond. The company was proposing to compost approximately 167 tons per day of bio-solids or bio-mass material (including scrubber ash) from St. Mary's Paper in composting windrows, a process Agri-bond says will convert the material to a compost-like soil conditioner. While Agri-bond claimed that the material will become suitable compost-like soil conditioner, the applicants argued that it was misleading to consider the material as compost because it did not heat up to the minimum composting temperature of 55 degrees centigrade and biodegrade in the way that compostable material does normally.

The applicants own residential property near the site and they sought leave to appeal the approval of the site on several grounds, including:

1. MOE had failed to protect air quality in the vicinity of the site because a certificate of approval for air emissions was not required by the ministry. The applicants stated that there could be a hazard to human health arising from the airborne bioaerosols and contaminants (such as the *Aspergillus fungus* and endotoxins) produced in the composting process.

2. The instrument should have included a provision for financial assurance in case funds for site cleanup were required.

3. Wetlands and endangered species on the site were not adequately evaluated.

4. MOE failed to address concerns with contaminants contained in the paper mill sludge waste which could leach into groundwater.

In a decision released in mid-September 1998, the Environmental Appeal Board denied leave to appeal to the applicants.[12] The Board found that the applicants failed to satisfy the test for leave to appeal under the *EBR*. The Board quoted an August 1997 memo by a senior material specialist at MOE who contended that "the risk to the general public due to bioaerosols from composting facilities is very small." The Board also found that the amounts of toxic organics (i.e. dioxins and furans) in the paper sludge were "well below" ministry guidelines for application to

[12] On September 10, 1998, Laura Wheatley withdrew her application for leave.

agricultural soil. Finally, the Board concluded that the C of A issued by the ministry is "a comprehensive instrument" that meets "state-of-the-art requirements and standards" for composting set out in the MOE's *Interim Guidelines for the Production and Use of Aerobic Composting in Ontario* (1991).[13]

Despite the failure of the applicants to meet the leave test in the *EBR*, the Board went on to recommend that, "in the spirit of the *EBR*", MOE staff should take the initiative to arrange a meeting of the applicants, Agri-bond and the MOE by October 31, 1998 for the purpose of explaining how the C of A issued to Agri-bond will ensure "the health and safety of all persons and the protection of the environment." In addition, such a meeting would provide an opportunity for the company to explain how it would fulfil its management responsibilities under the C of A and an opportunity to discuss possible regulatory gaps such as the complaint procedure and off-site monitoring of the operation. The Board also offered to make a Board member (other than the presiding member) available to facilitate such a meeting.

In early October 1998, MOE agreed to have the recommended meeting. The chair of the Environmental Appeal Board acted as the mediator for the session. However, participation in the meeting was limited to local residents and only two people decided to attend.

Aegean Enterprise: Appeal of a Waste Transfer Station Approval

In early September, the ECO received a leave to appeal application on behalf of 17 small and medium-sized companies operating in a light industrial area in Etobicoke, a suburb of Toronto. The companies were seeking leave to challenge an MOE decision to grant a provisional certificate of approval for a waste transfer station to Recycle Plus Limited by MOE under s. 27 of the *Environmental Protection Act* (*EPA*). The decision permits the facility to receive up to 383 tonnes per day of solid non-hazardous waste, including glass, paper products, plastics, metal and food waste, for the purposes of recycling. The total amount of residual waste for disposal (after compostables and recyclables have been removed) from the facility was not to exceed 199 tonnes per day.

The applicants sought leave to appeal the decision to grant the provisional certificate of approval of the site on several grounds, including:

1. Recycle Plus was operating without MOE approval, contrary to the *EPA* and an MOE field order.

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[13] MOE, *Interim Guidelines for the Production and Use of Aerobic Composting in Ontario* (November 1991). Toronto: MOE, 1991.

2. Environmental harm had occurred and would continue with the operation of the Recycle Plus waste disposal site, including odours, litter, vermin, waste spills on municipal and private property, and leachate contamination of soil, ground water and surface water. The applicants contended that the ministry was knowingly creating an abatement problem that it would not be able to address because of deep fiscal cutbacks at MOE in the past three years.

3. The C of A did not require a system for the proper collection, treatment and disposal of leachate generated by the food waste processed by the company and this caused serious adverse effects and harm to the land by contamination of soil, and surface and ground water.

4. The applicants submitted that the collective effect of the various nuisance impacts from the Recycle Plus operation on the local area would be significant harm to the environment, material discomfort to the neighbours, and interference with the conduct of business. The terms and conditions of approval had not mitigated the existing impacts.

5. The MOE should not had approved of a facility that the Toronto (Etobicoke) Zoning Code specifically prohibits.

6. The amount of financial assurance required to be provided did not protect the public from bearing the cost of waste removal and site cleanup in the event that the operator abandons the site with one week's worth of waste accumulated there, and did not follow the MOE policy governing the imposition of financial assurance.

In its reply to the application, Recycle Plus stated that the applicants had failed to provide "good evidence" in support of their application. Recycle Plus also contended that the applicants were not members of an association and they could not meet the test of being a person interested in the decision as required by s. 38(1) of the *EBR*.

In mid-November, the Board determined that the test for leave to appeal had not been satisfied by the Applicants and therefore denied the application. The Board found that the Director had exercised his discretion in a reasonable manner in determining that a public hearing was not required under the *Environmental Protection Act* and that the comments of the Applicants were considered by the Director in granting the C of A. The concerns of the applicants relating to odours, amounts and types of waste, rodents and financial assurance had each been addressed in the C of A.

The Board further noted that the adequacy of the conditions contained within the C of A depended upon whether the instrument holder was complying with the conditions and whether those conditions were being enforced. These are separate issues as to whether the conditions themselves were reasonable. In the event of a lack of compliance, the Director could take further action, including prosecuting the instrument holder, revoking the C of A, or revising and

amending conditions as circumstances present themselves. The Board suggested that the Director revisit the financial assurance condition in response to comments made in the submissions by the parties, and noted the need to monitor this facility carefully, especially in regard to the site operations and record keeping requirements.

The applicants requested that the Board permit them to reply to the responses filed by Recycle Plus Ltd, the instrument holder, and by the Director for the Ministry of the Environment. This request was denied as the Board found that the request did not meet the test set out in Rule 19.9 of the Board's Rules of Practice.

The standing of the applicants to bring a leave to appeal application was challenged by the lawyers for the instrument holder. The applicants described themselves as a group of 17 corporations which formed an unincorporated association with a common interest. Although the Board did not consider the applicants to be an association, it found that the seventeen companies were neighbours to the instrument holder and had an interest in the business of the area. Therefore, they were considered to be a person in the sense of section 38 of the *EBR*, the leave to appeal provision, and were granted standing accordingly.

Greta and Keith Thompson: Appeal of a Landfill Site Approval

In November 1998, seven separate applicants living in southwestern Ontario sought leave to appeal a Ministry of the Environment decision to grant a C of A to the Ridge Landfill Corporation. The decision involved an amendment to the certificate of approval for a waste disposal site (landfill) granted under s. 27 of the *Environmental Protection Act.* The amendment extended the time frame for which the site is able to accept industrial, commercial and institutional (IC&I) waste from all of Ontario from December 21, 1998, to the date upon which the site reached approved capacity.

The applicants sought leave to appeal the decision to grant the amendment on several grounds. The applicants argued that there was no demonstrable need for an all-Ontario IC&I waste service area for the landfill and that the amendment circumvented the *Environmental Assessment Act* process by effectively expanding the scope of a previous *EAA* approval. The extension permits IC&I waste disposal upon lands not zoned for waste disposal.

Another ground for the appeal was that the proponent had a lengthy history of non-compliance with applicable regulatory requirements. Other grounds were that the amendment,

S was contrary to relevant MOE policies, guidelines and directives;

S was inconsistent with the purpose of the *EPA* in that the landfill might, create a nuisance,

was not in the public interest, and might result in a hazard to public health;

- was not accompanied by adequate public notice and comment opportunities;
- would exacerbate previous environmental and nuisance impacts suffered by the applicants from the operation of the landfill; and
- provided no meaningful mechanism for timely or effective monitoring and enforcement at the landfill site.

In late December 1998, the Board granted the leave to appeal application. The Board found that the amendment circumvented earlier ministerial approval (dated June 24, 1998) to expand the landfill site under the *EAA*. The *EAA* approval was based upon the approved service area in force at that time, which permitted waste acceptance only until December 21, 1998.

The Board found it extraordinary that the instrument-holder sought to continue its all-Ontario service area for IC&I waste through an amendment to its C of A and not through the *EAA* process. The Board also stated that the use of the two approval processes created undue confusion, making it difficult for the ordinary citizen to consider and respond to the proposal as one package since it involved a four-fold expansion of the landfill's capacity and a 20-year extension on the disposal of IC&I waste. The Board found that the MOE Director's decision to grant the amendment was unreasonable given the *EBR*'s purpose of encouraging public participation in environmental decision-making.

In regard to the issue of environmental impact (the second part of the leave to appeal test), the Board accepted the applicants' submission that waste disposal is an environmentally significant activity with considerable potential to cause off-site environmental health and safety problems.

In spite of the success of the applicants' arguments, the following developments took place:

1. On January 20, 1999, the Ontario Municipal Board decided to dismiss, without a hearing, the appellants' appeal of the re-zoning by-law for the landfill site.

2. On January 27, 1999, without a hearing, MOE issued a new C of A to Ridge Landfill Corporation, permitting the disposal of IC&I waste from all of Ontario for the next 20 years.

3. On January 28, 1999, the Environmental Appeal Board accepted Ridge's request to lift the stay of the operation of their C of A (which was the subject of the leave to appeal application) enabling them to accept IC&I waste from all of Ontario to the site.

After these events, the appellants withdrew the appeal. Their lawyer explained that "our clients can no longer justify the cost, time and effort required" since their "*EBR* appeal has been overtaken, or largely rendered moot, by these developments."

Soyers Lake Ratepayers Association (SLRA): Appeal of a Golf Course Irrigation Permit issued by MOE

In early February 1999, the Soyers Lake Ratepayers Association (SLRA) applied to the Environmental Appeal Board (EAB) for leave to appeal the decision of the Director of the Ministry of the Environment (MOE) to grant a PTTW to Woodlands Ranch to take up to 4,540 litres of water per minute or 2,724,000 litres per day from Little Soyers Lake in Haliburton County for the purpose of irrigation for 25 years. The water-taking is to commence on May 20, 2000 and is restricted to the period between May 15 and September 30 of each year.

The SLRA sought leave to appeal the decision to grant the PTTW on a number of grounds. They contended that:

- Before granting the PTTW, MOE had failed to provide sufficient notification and consultation on the PTTW to the 180 seasonal and permanent residents of the area.

- There was virtually no rainfall in this watershed between May 15 and September 30, 1998 and that under such conditions the PTTW could result in a lowering of the level of the primary in-flow source (Little Soyers Lake) of over 50cm. Such a lowering would virtually extinguish the flow to Soyers Lake, and could lead to a reduction in the irrigation of the Soyers Creek wetlands.

- The reduced water levels in the two lakes would reduce dilution effects on golf course runoff, resulting in increasing concentrations of chemical fertilizers, herbicides and pesticides in the remaining water. They noted that this would increase the toxicity of the contaminants to biota in the stream, lake and wetlands.

In view of their arguments, the SLRA suggested that the rate of water-taking be reduced under dry conditions and linked to monthly average lake levels of Soyers Lake and stream flow in Soyers Creek. Moreover, the decreased water-taking rate should also be linked to phosphorous levels in Soyers Creek. They also recommended that:

- The records of water taking measurements should be validated by an independent third party, and validated annual reports should be submitted to the affected municipalities *and* the SLRA.

- The PTTW should be issued for five years only, with renewal conditional on approval from MOE, in consultation with the affected municipalities and the SLRA.

In its March 22 submission to the Board, for the first time MOE supported suggestions made by the applicant in an *EBR* application for leave to appeal.

On April 13, 1999, the EAB granted SLRA leave to appeal the decision. The Board found there was disagreement about the surface area and water capacity of Little Soyers Lake; and that the basis for the Director's decision (submitted by Woodland's Ranch) "appear[ed] to be questionable."

With regard to the reasonableness and environmental harm tests, the EAB found that a reasonable person could honestly question the effects of the PTTW on water levels in *both* lakes; MOE may not be able to respond quickly enough if drought conditions occur; significant environmental damage could occur in the time between the Director's awareness of a complaint and the issuance of a response to Woodlands Ranch.

As a result, the EAB granted leave to appeal on condition that:

1. The parties use every effort to resolve the dispute *before* the hearing.

2. The leave to appeal be limited to the issues of the

   - rate of water taking
   - terms of notification to MOE by the instrument holder; and
   - dates between which water-taking will be permitted.

A meeting between representatives of the Soyers Lake Ratepayers Association and lawyers for MOE and Woodlands Ranch was held on June 9, 1999. After the meeting, a set of conditions was drawn up by MOE for the permit that essentially addressed all of the concerns raised in the appeal. MOE will incorporate these conditions into the permit, which will be re-issued and posted on the Registry for an additional 30-day comment period in the near future. The Environmental Appeal Board accepted the appellants' withdrawal of the appeal, dated June 16, 1999.

Northwatch #2: Leave to Appeal on MOE Decision on Biomedical Waste Management Facility

In March 1999, MOE decided to grant a C of A to Enviro-Med Canada Limited (EMC) under s. 27 of the *EPA*. The decision permits EMC to operate a biomedical waste management

facility in North Bay using a "hydroclave" waste treatment system. A hydroclave operates by placing the waste in an enclosed metal vessel that is then surrounded by steam.

The steam heats the waste to approximately 135 degrees Celsius, destroying any pathogens that may be present in the waste. Once cooled, the waste is shredded, then transported to a landfill for permanent disposal.

In late March, Northwatch filed an application for leave to appeal the decision to approve this relatively new technology. Northwatch is a regional coalition of environmental and citizen organizations that provide a "pro-north" perspective on a number of environmental issues. The group contended that MOE's decision conflicted with a biomedical waste strategy developed in the early 1990s, titled "A Strategy for the Development of New Biomedical Waste Management Facilities in Ontario" (the Strategy), wherein it states that "biomedical wastes should be managed and disposed close to their point of generation." Northeastern Ontario generates only 1.3 tonnes of biomedical waste a day. The proposed facility is designed to process 13.5 tonnes per day and is permitted to accept waste from all of Ontario. Moreover, the MOE strategy states that a public hearing under the *EPA* is mandatory for all biomedical waste facilities developed as part of a regional plan, and that all biomedical waste facilities not developed as part of a regional plan would require approval under the *Environmental Assessment Act* (*EAA*). Neither took place in this instance.

Northwatch also contended that the hydroclave technology is insufficiently tested. The group alleged that the decision would result in significant environmental harm because the technical and operating difficulties which characterize the hydroclave technology could result in a failure to sterilize all waste materials effectively and fully and allow pathogens to be released. The process may also cause the release of dioxins and mercury to the environment.

Northwatch also argued that MOE's decision was unreasonable because additional conditions to reduce the risk of adverse effects from the EMC waste management facility were not imposed, including:

- a protocol for dealing with damaged or leaking containers;
- a requirement that the proponent establish and support a public liaison committee; and
- a requirement for waste minimization practices or waste avoidance.

The Environmental Appeal Board denied the leave to appeal application, releasing the reasons for its decision in July 1999. The Board found that the "Strategy for the Development of New Biomedical Waste Management Facilities in Ontario" had not been adopted by MOE and was thus not a policy requirement but rather a proposal suggesting various ways to consider establishing regional strategies for the disposal and treatment of biomedical waste. Therefore, it was not binding upon the MOE Director's decision in this matter. For the same reason, the requirement in the Strategy that a public hearing be held under the *EPA* is also not binding upon the Director.

In regard to Northwatch's allegations concerning the insufficiency of the testing, the Board noted that condition 14 of the C of A specifically requires that Enviro-med undertake and successfully pass commissioning testing before it may begin to operate. It was also the Board's opinion that the Director acted reasonably in adding Condition 26 requiring any incoming waste that arrives in leaking or damaged containers to be repackaged. The applicant failed to suggest sufficiently what further protocols should be required.

Finally, the Board found that there is a negligible chance that there would be a release to the environment of dioxins and mercury. The Director's requirement that the facility must meet performance standards before it can be used is a sufficient condition. The hydroclave technology involves a closed vessel and there will be no air emissions. Furthermore, the facility is not an incinerator and will not reach high enough temperatures to form dioxins. Any wastewater from the facility will be collected, tested and disposed of in an appropriate manner.

Dombind Order Challenged by Federation of Ontario Naturalists and Others

In May 1999, the Federation of Ontario Naturalists by MOE and other groups and Ontario residents[14] challenged an order issued concerning the use of Dombind as a dust suppressant.[15]

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[14] The applicants for leave included: L.R.L. (Ric) Symmes (representing the Federation of Ontario Naturalists), Wendy Moore (representing the Federation of Ontario Cottagers' Association), Manfred Koechlin (representing the Quinte Watershed Cleanup), Eileen Conroy, Charles Potter, Pat Potter, Maureen Reilly, Wilgard Schiffers, Abby Shukster, and Myrna Wood.

[15] In December 1993, MOE signed a five-year letter of agreement with Domtar's pulp mill in Trenton, permitting the use of its black liquor as a dust suppressant on rural roads. The letter of agreement assumed that Domtar would soon undertake a major plant expansion, including a new recovery boiler which would use up the black liquor as fuel. This plant expansion did not occur, and instead, the plant approximately doubled its production of black liquor. The mill now produces nearly 100 million litres of this waste material each year. Domtar called the material "Dombind" and offered it free to about 70 rural municipalities in the region.

Dombind is water soluble, and according to MOE's application guidelines, should not be applied within 50 metres of a waterway to prevent toxicity to aquatic life. The ministry received complaints that the spreading trucks were not staying far enough away from rivers and creeks. There have also been numerous complaints over the past five years about the smell, look and stickiness of the material. A number of townships stopped using the material, citing environmental concerns. The World Wildlife Fund (WWF) launched a campaign against the spreading of Dombind onto roads, and urged MOE not to renew its letter of agreement with the company.

Then in December 1998, three former Ontario ministers of the Environment (Bradley, Grier and Harry Parrot, 1979-82) jointly signed a letter urging the current Minister of the Environment to end

The order was issued by the Brian Ward, MOE Director for Eastern Region, to Norampac Inc. on May 4, 1999 pursuant to s.18 of the *EPA*. It required the company to eliminate the use of Dombind as a dust suppressant over a period of time.

The applicants sought leave to appeal the decision to issue the order on the following grounds:

1. The Director lacked the necessary authority to issue an order that explicitly or implicitly permits persons to use Dombind as a dust suppressant without issuing a Certificate of Approval to either Norampac or the Applicator.

2. The order failed to ensure that:

   - S the use of Dombind as a dust suppressant be phased out by the end of the year 2000;
   - S the dioxin levels in Dombind remain below 500 parts per quadrillion;
   - S the terms and conditions regarding the application of Dombind as a dust suppressant on roads be adequately enforced;
   - S adequate monitoring and reporting concerning the composition of Dombind and its impact on roads be carried out;
   - S the application rate of Dombind be limited to a reasonable maximum amount each year for any single location; and
   - S applicators of Dombind be properly trained.

3. The decision to issue an order under section 18 of the *EPA* is classified as a class II instrument under the *EBR*. A proposal for an instrument is classified as a class I or II proposal only if the proposal, if implemented, could result in a significant effect on the environment. Therefore, by definition, the order could have a significant effect or harm on the environment.

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the practice of spreading this material on roads.

Shortly afterwards, MOE announced that it intends to phase out the practice over the next two years, because the company was producing increasing amounts of the material and because of potential for long-term environmental impairment. In early 1999, the company said that the decision not to allow the spreading of its black liquor on rural roads threatens the future of its Trenton mill, including as many as 140 local direct jobs and 300 secondary jobs, because of the added cost of managing this waste.

On March 22, 1999, Domtar announced it was going to sue the environmental group, WWF, which had made allegations against Dombind, for libel and slander. The groups said that the sticky brown liquid is toxic. The three former environment ministers were named in the suit.

In a decision issued in late August, the Board granted the leave to appeal application for one of the stated grounds - whether the requirements and conditions for the application of Dombind as a dust suppressant as set out in the MOE Order provide an adequate means of enforcement. Leave to appeal on all other grounds (as set out below) was denied.

The Board first considered whether Dombind posed a potential harm to the environment, noting that the reasonableness of the Director's decision depended upon whether it could result in significant harm to the environment. After considering the various positions of the parties, the Board concluded that Dombind could harm the environment if its use is not effectively controlled.

After finding that Dombind does pose a potential risk to the environment, the Board made the following findings with respect to each of the grounds:

1. The applicants' concern that the order permits persons to use Dombind without obtaining a Certificate of Approval for a waste disposal site under the EPA was without foundation. The Board relied upon the unreported case, Temfibre Inc.,[16] in concluding that Dombind is recognized as a product rather than a waste. The Board concluded that the Director did not exceed his legal authority in issuing the order under section 18 of the *EPA*.

2. The applicants argued that an unduly prolonged process of phasing out the use of Dombind could increase the risk to the environment. The Board found that while the order does not refer to a fixed deadline, it does set out a precisely structured schedule for the design, development, and implementation of an alternative management strategy. The Board was satisfied that the schedule is a conscientious initiative by the Director to phase out the use of Dombind.

3. The applicants expressed a legitimate concern that the order does not include parameters for any of the contaminants that are the subject of the order. However, subsequent to the issuance of the order, an interim Monitoring and Reporting Plan was established in accordance with the order. The plan sets a limit on the level of dioxins that may be contained in Dombind at 500 parts per quadrillion, reported as toxic equivalent. The Board concluded that this was not an unreasonable way to achieve the objective.

4. Similarly, the Board concluded that the applicants' concern that the order fails to provide for an adequate monitoring and reporting program was rectified by the establishment of the interim Monitoring and Reporting Plan subsequent to the issuance of the order.

5. The concern raised by the applicants that the order fails to ensure a reasonable maximum allowable application rate of Dombind each year for any single location was rebutted by the Director. The Director asserted that the order actually sets a more stringent limit on

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[16] Temfibre Inc. v. Her Majesty the Queen in Right of Ontario, Court File No. 46/89, May 31, 1989

the application rates for Dombind than were in place before. The Board found no reason to doubt the Director's clarification and thus there was no basis for stating that the Director acted unreasonably.

6. The applicants expressed concern that the order failed to ensure the proper training of those who apply Dombind. The Board noted that a training program was submitted in accordance with the order and approved by the Director. The Board found no reason to doubt that the approved program, together with the approved applicator monitoring program, would ensure the observance of proper training standards and performance.

7. The Board accepted the applicants' assertion that the order failed to provide an adequate enforcement mechanism for the rules regarding the application of Dombind as a dust suppressant. The Board found that the language of the order provided far too wide a scope to applicators to evade their responsibilities to ensure that Dombind was not applied to any point which is within 50 metres of any water or watercourses. Furthermore, the Board also found that those who apply Dombind, such as municipalities or other persons responsible for the maintenance of the roads, driveways and parking lots to which dust suppressant is to be applied, would not qualify as owners, managers or controllers of an undertaking or property. Therefore, the Board decided that there was some doubt that the order could be enforced against these applicators.

The Board concluded that the Director acted unreasonably in failing to provide for adequate enforcement of the rules for the application of Dombind as a dust suppressant and that this failure could cause significant environmental harm. The Board granted leave to appeal on this sole ground accordingly.

On October 20, 1999, the Environmental Appeal Board allowed the appeal in part. The Board accepted the minutes of settlement signed by the parties and dated September 23, 1999. The Board ordered that Appendix I to the Director's Order be deleted and replaced with the conditions agreed to by the parties, as set out below in Appendix I. Any remaining issues raised by the appeal were dismissed.

Schneider and the Hamer Bay Cottagers: Challenge To Golf Course Permit to Take Water

In July 1999, three months after leave to appeal was granted to cottagers living around Soyers Lake in Haliburton (see above), 52 cottagers and residents living on Hamer Bay on Lake Joseph in the Muskokas[17] challenged a permit to take water issued to Clublink, a golf course

[17] According to ECO files, the action was initiated by Hamer Bay resident, Walter Schneider and his colleagues.

developer and operator. Changes to the MOE's PTTW allowed Clublink to increase its rate of water taking from Hamer Bay of Lake Joseph from 120,000 to 3.4 million litres per day.

The applicants sought leave to appeal the decision to grant the PTTW, alleging the following grounds:

1. The PTTW failed to include as a condition of approval that ClubLink adhere to its own proposed construction techniques and operation protocols as outlined in an environmental study prepared for ClubLink, which were designed to minimize the adverse impacts on the environment. The applicants argued that an enforcement mechanism was necessary to ensure that the construction techniques and operation protocols were followed.

2. The Director erred in concluding that a monitoring program requirement, although necessary in order to protect the environment, more appropriately belongs as a condition of a certificate of approval granted pursuant to section 53 of the *Ontario Water Resources Act* (*OWRA*). The failure to require a monitoring program as a condition of approval of the PTTW was contrary to the spirit and intent of the *EBR*, the *OWRA* and the policies of MOE.

The applicants argued that because of these alleged errors, there is good reason to believe that no reasonable person, having regard to the relevant law and policy, could have made the decision to issue the PTTW.

In a decision released on August 31, 1999, the Board granted the leave to appeal application.[18] The Board found as a common thread of the two grounds of appeal that the Director failed to impose conditions that would prevent certain water quality impacts that might result from the irrigation of the proposed golf course. The Board rejected the Ministry of the Environment's submission that section 34 of the *Ontario Water Resources Act* only allows the Director to impose terms and conditions related to water quantity when issuing a permit to take water (PTTW) and prohibits the Director from imposing terms and conditions that address impacts on water quality.

The Board accepted the applicants' submission that section 34 should be interpreted more broadly and that the Director, in making a decision whether or not to issue a PTTW, should have applied an ecosystem approach and attempted to prevent pollution in order to protect, preserve and sustain the province's water resources.

The Board based its decision on the wording of section 34 of the *OWRA*, the direction provided by MOE Procedure B-1-1: Water Management Policies, Guidelines, Provincial Water

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[18] The full text of the decision is available by accessing the Environmental Appeal Board's Web site on the Internet at the following address – www.ert.gov.on.ca – Click on the "decisions" icon. The decision may be downloaded in portable document format (PDF).

Quality Objectives, July 1994 ("Water Management Policy"), and MOE's Statement of Environmental Values (SEV). The Board noted that section 34 requires MOE to consider whether a proposed water taking might interfere with "any public or private interest in any water". In the Board's view, this authorizes the Director to consider the consequential impacts of the water taking on the quality of "any water". The Board also found that a narrow interpretation of section 34 is inconsistent with MOE's Water Management Policy. The policy commits MOE to adopting an ecosystem approach to watershed management. This includes a consideration of the "physical, chemical, and biological components and their inter-relationships" of water resources. The policy also clearly states that pollution prevention is more desirable than end-of-pipe treatment or remedial actions. MOE makes similar commitments to ecosystem management and pollution prevention in its SEV.

In the Board's opinion, MOE is required to exercise its decision-making authority under section 34 of the *OWRA* in a manner that takes these principles into account. The Board decided that it would have been entirely consistent with these principles for the Director to impose as conditions to the PTTW terms that address water quality impacts. Therefore, the Board was satisfied that the applicants had shown a real foundation for their concern that the Director's interpretation of section 34 of the *OWRA* was unreasonable having regard to the interpretation and application of the law and government policies.

The Board then considered whether there was potential for significant harm to the environment. The Board based its decision on a consultant's report that was prepared in support of the application for the PTTW. The report describes the potential impact of the irrigation of the golf course on water quality, among other things. It addresses the impact of irrigation on wetlands and watercourses and makes recommendations regarding storm water run-off and the careful use of fertilizers, pesticides, and herbicides. The Board found that because the PTTW does not contain any conditions designed to protect the quality of the water and watercourses in and around the proposed golf course, there was the potential for significant harm to the environment.

Therefore, the Board found that the applicants had satisfied both aspects of the test for leave to appeal set out under section 41 of the *EBR*. Accordingly, the Board granted Leave to Appeal on the two grounds requested by the applicant.

The Board chose not to follow the interpretation of section 34 of the *OWRA* as set out in an earlier decision of the Board in Wetlands Preservation Group of West Carleton,[19] which is discussed above.

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[19] *Wetlands Preservation Group of West Carleton v. Ontario (Director, Ministry of Environment and Energy)* (1996), 20 C.E.L.R. (N.S.) 65.

General, Laclair and the Estate of Josephine General

In October 1999, Sylvanus General, Joseph Laclair and the Estate of Josephine General ("the applicants") applied for leave to appeal a decision of the Ministry of the Environment to issue a PTTW to Canadian Gypsum Company (CGC) Ltd. for industrial processing and mine dewatering.

The applicants alleged that the Director's decision was unreasonable because of the following grounds:

1. The Director had full knowledge of the environmental impact arising from previous PTTW, issued to CGC, and CGC's had not fulfilled of the conditions precedent for renewing the PTTW;

2. The Director issued the PTTW despite the uncertain (and unapproved) status of CGC's "mine closure plan;"

3. The Director issued the PTTW without complying with Part II of the *EBR* regarding public notice and comment; and

4. The PTTW was classified as a Class I instrument under the *EBR* and is therefore presumed capable of causing significant environmental harm.

In its decision on December 20, 1999, the Environmental Appeal Board denied the application for leave to appeal. The Board found that an expert witness for the applicants had not provided data to support his opinions. The Board also found that while the Director's data and that of the CGC were not as complete as they could have been, to delay the hearing for a year or two to enable more comprehensive data to be collected about the effect of the dewatering on the area wells and Boston Creek would be a serious waste of time and detrimental to the environment.

The Board reasoned that granting the leave to appeal to allow this matter to proceed to a hearing would only delay the removal of potentially contaminating materials from the West Mine and delay the in-filling of water into the West Mine. In addition:

1. The Board found that such a hearing would delay the return of the groundwater aquifer to its pre-mining level;

2. The Board added that the end result of the clean up activity proposed by CGC and allowed by the PTTW would be to restore the groundwater aquifer to what it would have been in the early 1960s, which would have the effect of restoring water levels in the affected area wells;

3. The Board stated that it was not unreasonable for the Director to assume that once the groundwater aquifer was restored, the applicants' water supply would be fully restored; and.

4. The Board found that since the effect of the PTTW would be to restore the natural environment, this would be in keeping with the objectives of the *EBR* "to protect, conserve, and where reasonable, restore the integrity of the environment by the means provided in the Act".

In conclusion, the Board found that the applicants failed to meet the test in s. 41 (b) of the *EBR* for significant harm to the environment because the applicants failed to show that the PTTW would have a significant impact upon the present levels of the groundwater aquifer, water levels in the Boston Creek, or the stability of land in the area.

Felske, Noble, Holmes and Anders

In October 1999, Brian Felske, Mark Edward Noble, Bridget Holmes and Carl Anders ("Artemesia Waters Ltd") applied for leave to appeal a decision of the Ministry of the Environment to issue a PTTW to Artemesia Water Ltd. for commercial water bottling and distribution.

The grounds for the application for leave to appeal were the following:

1. The PTTW allowed the proponent to remove water from the Rocky Saugeen River and aquifer without imposing any restrictions as to the time of year, climatic or ecological conditions when the water may be taken. Mr. Felske was concerned that reduction in the volume of water flowing in the river could result in the following negative impacts:

   - S negatively affect the existing cold water fishery;
   - S reduce the potential to develop a hydroelectric facility; and
   - S reduce the scenic beauty of the river, including a waterfall and rapids, negatively affecting Mr. Felske's enjoyment of his property and the potential for tourists and local residents to experience this beauty.

2. Mr. Felske received no notice of the proposal and it was his opinion that insufficient notice was provided to those who could potentially be affected by the PTTW.

3. Mr. Felske had been advised that peer reviews of the proponent's hydrogeological studies identified technical inadequacies that must be satisfactorily addressed before the issuance of any permit. These issues should not be dealt with as part of ongoing monitoring.

4. The issuance of the PTTW was premature and should have been approved only once the required land use approvals were obtained.

5. It appeared that no studies were undertaken by the proponent to assess any effect the PTTW might have on the biota and other components of the natural environment within the Rocky Saugeen watershed.

In December 17, 1999, the Environmental Appeal Board denied the application for the leave to appeal. The Board first considered whether the *Ontario Water Resources Act* is of no force and effect because it is inconsistent with section 92A of the *Constitution Act*, 1867. One of the applicants submitted that section 92A grants exclusive jurisdiction over non-renewable resources to the provinces. It was argued that Ontario did not have jurisdiction over water because it is a renewable, not a non-renewable resource. The Board accepted the submission of the Ministry of the Environment that the provinces have jurisdiction over all natural resources, both non-renewable (because these are specifically included in section 92A) and renewable (because section 92A is silent regarding renewable resources and section 91 of the *Constitution Act*, 1867, setting out matters over which the Federal government has exclusive jurisdiction does not specifically include renewable resources). The Board concluded that the provinces and the federal government have shared jurisdiction over water and that the *OWRA* is a valid law.

The Board then considered the submissions of the parties concerning whether the Director acted unreasonably in issuing the PTTW. The Board grouped the issues raised in the applicants' submissions into four categories and resolved them as follows:

1. The issuance of the permit was contrary to a moratorium announced by the Minister of the Environment.

The Board decided that the MOE Director is the designated person who has jurisdiction and discretion to issue a PTTW. The minister's announcement emphasized that all technical information should be carefully considered by Directors when exercising their jurisdiction to issue PTTWs under section 34 of the *OWRA*. The Board found that the Director considered and weighed all the information and the decision could be construed as being in conflict with the minister's statement.

2. Ecological Conditions, Technical Concerns and Considerations

The applicants raised a number of concerns with the technical aspects of the materials submitted by the proponent in support of the application for the PTTW. The Board considered each of these and noted the response by the proponent in each case. The Board also noted that two experts from MOE reviewed all documentation and agreed with the conclusions presented by the proponent. The Board found that the Director made a reasonable decision with the information available. Furthermore, the Director added two conditions to the PTTW to provide assurance to the local community that the water

supply for the residences and farmers would not be in jeopardy and that the protection of the natural environment would continue.

3. Ecosystem Approach

The Board weighed whether the Director adequately considered the ecosystem approach as set out in the ministry's Statement of Environmental Values. The Board noted that the ecosystem approach is still being incorporated into the ministry's decision-making processes and hoped that MOE would take note of the importance of its Statement of Environmental Values in evaluating all undertakings that fall under its jurisdiction. In this case, the Board found that the technical report submitted by the proponent had been examined carefully and responses made as to the technical aspects of the proposal to ensure environmental protection.

4. Value and Enjoyment of Property and Premature Decision-Making

The Board found that the issues raised by the applicants regarding land value and land planning are outside the jurisdiction of the *OWRA*. Thus, it did not consider these issues. In regard to the specific issue of whether the PTTW would result in a reduction of water flow for downstream users, the Board noted that the PTTW contains conditions that provide these users with a remedy to take action.

In view of these considerations, the Board found that the Director's decision was reasonable having regard to the relevant law and government policies and, accordingly, denied the application for leave to appeal.

On January 13, 2000, the Environmental Commissioner of Ontario received a letter from one of the applicants requesting a review of perceived errors in the EAB's decision. The Acting Commissioner, Ivy Wile, wrote to the applicants and explained that the ECO does not review decisions made by the Board.

On January 28, 2000, the EAB issued supplementary reasons clarifying, but not changing, its decision.

Kolodziejski

In December of 1999, Alex Kolodziejski ("the applicant") applied for a leave to appeal the decision by the Ministry of the Environment to issue a permit to take water PTTW to Mansfield Ski Club Inc. The grounds for his application for leave to appeal were the following:

1. The Director failed to take the ecosystem principle into account in issuing the PTTW.

2. The Director failed to take measures to prevent water interference for other users.

3. The Director failed to consider the rights of the applicant, the riparian owner.

4. The Director failed to consider the priority of uses established by MOE Water Management Policy, including the impact of the increased water taking on previous existing adjacent agricultural land use and subsequent financial losses.

5. The Director's decision to issue the PTTW to Mansfield would result in significant harm to the environment. The applicant maintained that the PTTW would increase the historic water taking by Mansfield by several fold and would therefore likely result in a significantly greater runoff event for which there has been no assessment.

On February 14, 2000, the Environmental Appeals Board granted the leave to appeal application. In its decision, the Board grouped the issues raised by the applicant into five categories and summarized them as follows:

1. The volume of water taking in the new PTTW;

2. The requirement in the PTTW to measure water taking;

3. The construction of the weir in the Pine River;

4. Meltwater from the ski hill and its effects on the Pine River and the applicant's property; and

5. Failure to take into account the ecosystem principle.

On the first ground, the volume of water taking, the MOE admitted that it had made an error in calculating the maximum amount that could be taken in April, and the Board noted that the correction for this amount could be adjusted at the time of the appeal. When discussing the fourth ground the Board found that "the quality of the water in the Pine River can be affected by the snowmelt as a result of the water taking which has caused, will cause or has the potential to cause environmental harm." On the issue of the Director's failing to take into account the ecosystem principle, the Board stated that "the Statement of Environmental Values is a document for due consideration in scrutinizing each application for a water taking permit. During the

appeal, the issue of the ecosystem approach using the Statement of Environmental Values would be examined as part of the issues to be addressed."

In its conclusion, the Board stated that "[t]here is good reason to believe that there exists a potential for significant harm to the environment, in particular the Pine River.

Furthermore ... there is good reason to believe that there is foundation by the Applicant, with respect to the runoff affecting the quality and quantity of the water in the Pine River, that the permit should be appealed." However, Mr. Kolodziejski was dismissed on April 5, 2000. The board found that Mr. Kolodziejski's evidence at the hearing did not demonstrate that the runoff from the melted snow at te ski club had been detrimental to the quality of water in the Pine River-intrinsically and as a habitat for a cold water fishery.

D' Angelo and the Community Liaison Committee for the Taro East Landfill

In February of 2000, Carmen D' Angelo applied for leave to appeal the decision to amend the C of A for the proponents' waste transfer and processing site. The grounds for the leave to appeal was that the proposal could result in significant harm to the environment.

On March 8, 2000, the Environmental Appeal Board dismissed the application for leave to appeal on the following grounds:

1. The Board found that the applicant failed to provide any valid evidence demonstrating that no reasonable person, having regard to the relevant law and policy, could have made the decision, or that the decision could result in significant harm to the environment, as required under section 41 of the *Environmental Bill of Rights.*

2. The Board found that the applicant provided no evidence that the actions of the Director in issuing the certificate of approval were contrary to his responsibilities under the *Environmental Protection Act* or the *Environmental Bill of Rights.* In the Board's view, the application contained only unsubstantiated allegations.

3. The Board also noted that the applicant did not properly respond to the Board's request for clarification of various items in the application. In failing to do so, the applicant did not abide by the Board's Rules of Practice and Procedure.

4. The Board considered this to be a serious breach of the Rules and, in and of itself, cause for dismissal of the application.

The Concerned Citizens of Haldimand Incorporated

In February of 2000, the Concerned Citizens of Haldimand, Incorporated, applied for leave to appeal the decision by the Ministry of the Environment to issue a permit to take water (PTTW) to the proponent 1340152 Ontario Inc. for commercial water bottling.

They sought leave to appeal on the following grounds:

1. It was not reasonable to allow a new major water extraction in a community experiencing water shortages. Provincial guidelines state that domestic and farm uses have priority over individual and commercial uses.

2. The PTTW was issued for a 10-year period even though the Ministry of the Environment stated on September 28, 1999, that only two-year PTTWs would be permitted.

3. MOE did not have sufficient data on environmental impacts on the community and was relying on the proponent's data. The applicant sought an independent peer review of the proponent's hydrogeological reports.

4. MOE was unable to ensure ecosystem integrity and did not have due regard for its own policies concerning an ecosystem approach in relation to water extraction, because it had no monitoring system, rehabilitative measures or mechanisms to reconsider permits, and it had no botanical, fishery or wildlife inventories in place.

5. It was unreasonable to grant new and substantial groundwater extraction permits which could result in significant harm to the environment, in light of recommendations in the International Joint Commission's 1999 Interim Report, "Protection of the Waters of the Great Lakes."

6. In granting the permit, MOE had failed to ensure riparian rights to land owners affected and did not have in place measures to prevent water interference for other users.

In its April 2000 decision, the Board denied the leave to appeal application on the following grounds:

1. The Director has provided persuasive information showing that the proposed well is not located in the Oak Ridges Moraine Aquifer, and that the area of water taking is not drained by Cold Creek and the associated wetlands, which have been designated "provincially significant."

2. The surface waters are not affected and the safeguard provisions of the one-year permit ensure continuity of water supply.

The Board noted that the Environmental Registry posting on the instrument was misleading in that it had referred to two wells with an amount of taking of 162 litres per minute for 10 years. However, the actual permit issued was for one well with an amount of taking of 162 litres per minute for one-year, and the text of the Registry decision posting did not reflect this. The Board suggested that the applicant may have believed that the Director had issued a permit for 10 years because of the misleading Registry notice.

Other LTA Applications That Were Out of Time

The requirement in the *EBR* that the person seeking leave to appeal must apply to the appeal body within 15 days of the decision being posted on the Environmental Registry is a strict one. Members of the public are sometimes prevented from seeking leave because they miss the 15-day time limit. For example, in 1999, two environmental groups failed to apply within the 15-day period.

Gilbertson Case: Cottagers Challenge Water Diversion Project

In July 1999, Madeline Gilbertson and other residents of Northwestern Ontario sought leave to appeal the decision by the Director, Northern Regional Office, MOE, to issue a PTTW to the Pickerel Lake Cottage Association for the construction of a dam that would regulate water levels with no active control.

The applicants sought leave to appeal the decision to grant the PTTW, alleging the following grounds:

1. There was no information to justify the decision to set the water level at 98.76. Historically, the lake level had been much lower.

2. It was likely that downstream lake levels would be adversely affected. There was no indication as to whom would monitor these downstream lake levels.

3. It was possible that the higher lake level would result in the release of mercury and greenhouse gases.

4. It was not clear who was liable if higher water levels caused damage to Pickerel Lake.

5. The dam would stop or hinder the flow of water which might be detrimental to downstream fish habitat.

6. MNR had previously removed two illegal dams constructed at the same spot to enhance water flow to the lower lakes and spawning beds. It is unclear why this permanent dam was now being allowed to be built.

The applicants argued that because of these alleged deficiencies, there was good reason to believe that no reasonable person, having regard to the relevant law and policy, could have made the decision to issue the PTTW.

In a decision issued on August 20, 1999, the Board denied the application for leave to appeal because it was not received within the 15-day time period set out under section 40 of the *EBR*. [20]

In order to be of assistance to the parties, the Board set out what its findings on the merits would have been had the application been submitted within the required time limit. The Board was satisfied that the MOE Director thoroughly discharged his responsibilities in deciding to issue the permit to take water. At the request of the Director, the proposal was carefully reviewed by a Water Resources Scientist in the Technical Support Section of MOE's Regional Office. MOE also obtained information from the Ministry of Natural Resources (MNR) that advised that the proposal met all of MNR's requirements and would not have a negative impact on fish habitat, and that MNR was prepared to approve the dam subject to certain conditions. Further, MOE relied upon the advice of the Northwestern health unit and a professional hydrogeologist in concluding that the proposed dam would not adversely affect a malfunctioning septic system located on a property that borders upon Pickerel Lake.

For these reasons, the Board would have found, had the application been submitted within the required time limit, that the applicants did not establish that the Director failed to act in a reasonable manner with regard to the relevant law and to any government policies developed to guide decisions of this kind, nor was there any basis to suggest that the decision could have resulted in significant harm to the environment.

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[20] The decision by the MOE was posted on July 2, 1999. The letter from the applicants enclosing their application was dated July 14 but was not received by the Board until July 19, 17 days after the date of the decision. Therefore, the Board concluded it lacked jurisdiction to hear the application for leave to appeal and the application was denied accordingly. Under the *EPA* and the *EBR*, the Board has no discretion to extend the period for filing an appeal or a leave to appeal application.

The Algonquin Ecowatch Case

In 1998, Algonquin Ecowatch submitted an *EBR* application for investigation related to a history of discharges from a non-operational graphite mine on Graphite Lake, located in the headwater of the Magnetawan River.[21] The application alleged that environmental harm, including declines in fish populations, have occurred as a result of mine operations, citing a 1996 MNR report as evidence. The applicants feel that a remedial order and possible prosecution are needed to protect this ecosystem and the ecosystems down stream. The application referenced alleged contraventions of the *Fisheries Act* (Sections 35(1) and 36(3)) and the *Environmental Protection Act* and *Ontario Water Resources Act.*

MNR denied the application, noting that the Graphite Lake Mine site has undergone extensive review over the past several years by several ministries. Specifically the Ministries of Natural Resources, Northern Development and Mines, and Environment as well as the Federal Department of Environment have been working together to develop a closure plan for the site. In its rationale, the MNR also referenced an field order issued by the MOE against the mining company. The field order required the mining company to take immediate action on implementing an abatement plan to address the acid mine drainage. The MNR also notes that long-range remedial plans are also being developed.

In its response, the MOE stated that it is aware of contaminant discharges and water quality problems at the site and is taking steps under their compliance policy. The MOE stated that it had also been consulting over the past several years with other agencies (MNDM, MNR, Environment Canada) regarding the alleged environmental contamination. The MOE also noted that it had issued a field order against the company on July 14, 1998 to address immediate problems. The MOE also noted that additional abatement measures will be applied as appropriate and as expeditiously as possible by the MOE if the company fails to comply and notices of proposal will be posted on the EBR Registry as required under the *EBR* with respect to future classified instruments. The MOE also stated that it expected that the applicant's concerns will be resolved by the company.

If the company fails to address the concerns, the MOE said it will continue to work expeditiously with appropriate provincial and federal agencies to take necessary abatement actions to safeguard the environment.

In February 1999, the MOE issued a proposed Order requiring the companies involved (including both International Graphite Inc. and Applied Carbon Technology Inc.) to ensure that equipment, materials and staff are available to operate the mill yard facilities to prevent any discharge of contaminants and any adverse effect caused by such a discharge. The order also

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[21] Normally, the ECO keeps the names of the applicants confidential. In this case, the applicants have publicized their application to the media.

requires the submission of plans detailing the removal of acid-generating materials from the mill-yard and requires the removal of the acid-generating material. The order requires the company to conduct both surface and groundwater monitoring to assess the effectiveness of acid-generating material removal. Initially, the companies appealed the order.[22] However, the companies later withdrew their appeals.

The February 1999, order was posted on the Registry for public comment. Prior to the MOE posting of the decision notice in September 1999, Mike Wilton, a spokesperson for Algonquin Ecowatch advised MOE officials in North Bay that he was concerned about the adequacy of the proposed order and an MOE supervisor told him a copy of the final order would be sent to him when it was issued. Unfortunately, that person went on vacation and a copy of the order was not sent to Mr. Wilton until after the deadline for appealing the order had passed. Because he had expected a copy of the final order to be sent, Mr. Wilton did not monitor the Registry every day to look for a notice of the decision. As Mr. Wilton stated "we are a small organization and do not wish to put our scarce resources into duplicative efforts." Consequently, Mr. Wilton missed the deadline for filing his leave to appeal application.

This case and others highlight the importance for would-be leave applicants of monitoring the Registry closely, particularly when a key instrument decision is being made by a ministry.

2. The Right to Sue for Harm to a Public Resource

Section 2(3)(a) of the *EBR* was put into the Act to promote greater political accountability on the part of decision-makers. Many stakeholders feel that political accountability alone may not be enough to ensure that better decisions about the environment are made.

The *EBR* reflects this by containing new legal rights that increase public access to the courts and provide an additional measure of judicial scrutiny to contraventions of environmental laws that cause significant harm to an Ontario public resource.

There are some general requirements that must normally be met before plaintiffs can bring actions under the *EBR*. An action usually may not be brought except where a plaintiff has applied for an investigation into the alleged contravention and has received an unreasonably delayed response from the ministry or a response which is not reasonable.

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[22] In the instrument holder appeal notice loaded by the ECO on September 24, 1999 the appellant International Graphite Inc. states that its grounds for appeal of the Order are that the Order requires the submission of a monitoring and rehabilitation program to the director for approval, but that the specific criteria for the director's approval have not been provided. The Appellant stated that it would have no right of appeal from the Director's decision regarding approval of the monitoring program or rehabilitation plan. The appellant also stated that the monitoring program and rehabilitation plan are excessively broad and exceed what is required to deal with the discharge of acid drainage that may be affecting the water quality of Graphite Lake.

There is an exception where the delay involved in complying with these steps would result in significant harm to a public resource.

If a court finds the plaintiff entitled to judgment in an action under s. 84 of the *EBR,* the court may:

S grant an injunction;

S order the parties to negotiate a restoration plan in respect of harm to the public resource and report to the court on the negotiations within a fixed time;

S make a declaration; and

S make any other order, including an order as to court costs, that the court thinks is appropriate.

The court will not make an award of damages under this section of the *EBR.*

There also are special requirements if the lawsuit involves farmers, who may be protected against nuisance and civil lawsuits relating to odour, noise and dust under the *Farming and Food Production Protection Act.*[23] In these circumstances, an approval is usually required from the Farm Practices Protection Board before a lawsuit can be brought. In addition, parties who undertake actions using the right to sue provisions of the *EBR* are required to give the ECO notice so that notices can be posted about the actions on the Registry.

To date, only two parties have actually used the new right to sue provisions in Part VI of the *EBR.* However, fewer than 100 investigation applications have been screened or reviewed by the ministries (in response to Applications for Investigation under Part V of the *EBR*), and these ministry screenings are usually prerequisites for s. 84 actions.[24] Moreover, the handling of many key applications for investigation has been exemplary and this may have played a role in discouraging lawsuits under Part VI of the *EBR.*

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[23] In June 1997, the Minister of Agriculture, Food and Rural Affairs tabled Bill 146, the *Farming and Food Production Protection Act.* Bill 146 will replaced the *Farm Practices Protection Act*, passed in 1988. The *Farm Practices Protection Act* protected farmers from nuisance lawsuits for odour, noise or dust resulting from normal farm practices. Bill 146 extends the nuisance categories to include flies, light, smoke and vibration, and contains other expanded protections of farmers' rights. In addition, no municipal by-law can restrict a normal farm practice.

[24] Sub-section 84(2) of the *EBR* states that an action may not be launched unless an Application for Investigation has been submitted and the plaintiff did not receive a response within a reasonable time or has received a response that is not reasonable. An exception to this rule is provided by sub-section 84(6) which states that ss. 84(2) does not apply where the delay in complying (by preparing an application) would result in significant harm to a public resource.

Braeker Case: First Harm to Public Resource Lawsuit Under the *EBR*

In February 1998, Karl and Vicki Braeker, owners of a farm in Grey County, commenced legal proceedings against Max Karge, the owner of a property adjacent to their farm, and the Ontario government in relation to an illegal tire dump on Karge's land.[25] They allege that the illegal tire dump on Karge's property has contaminated the subsoil, groundwater, and surface water in the surrounding vicinity, including their well water. They also allege that the other two defendants (the Crown and a numbered company) bear some of the responsibility for the situation. In their Notice of Claim under the *Proceedings Against the Crown Act* filed on February 5, 1998, the Braekers alleged that the Ontario government had been negligent in its monitoring, inspection and enforcement activities related to the dump.

The February 1998 Notice of Claim sought damages to compensate the Braekers for loss,

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[25] This case is directly related to a series of Environmental Appeal Board decisions on the Karge case: see *Re: Karge* (1996), 21 CELR (N.S.) 5 (Ont. Env. Appeal Board). In these two decisions, the Ontario's Environmental Appeal Board ruled on the liability of an innocent lender. Karge, a farmer living on a property adjacent to Braeker, sold his farm to a young couple and took back a second mortgage. The purchasers did not pay the mortgage, but they did devastate the farm. They damaged the house, cut down the woodlot, sold off buildings, and illegally brought in mounds of tires. A neighbour alerted MOE when there were 15,000 tires. The purchasers brought in another 15-20,000 tires during the time that MOE visited the site and wrote letters. MOE then allowed the purchaser to bury the tires on the farm, without notice to the mortgagee and over the neighbours' objections. This appears to have raised the cost of removing the tires from $30,000 to more than $140,000, more than the total value of the farm. Shortly thereafter, the purchaser disappeared. To protect what was left of the farm, the farmer incorporated a company to buy certain rights from the first mortgage. Neither he nor the company formally took possession of the farm, but he did (to keep the house insured) put tenants on the property, at a net loss.

MOE prosecuted the purchaser; a large fine was imposed, but not collected. MOE then ordered the farmer to dig up and dispose of the tires. Karge appealed. In its decision, the Board agreed that the farmer had "charge and control" of the farm, because he had selected tenants, paid expenses and collected rent. However, he was innocent, especially in contrast to MOE. The EAB therefore made a tentative ruling that the farmer should not be further victimized. He does have to pay for removal of the tires from the site, but only out of any net profits he may make from the land, after recovering his mortgage. He would not have to pay to dig the tires up and clean them.

MOE tried to persuade the EAB to change this ruling. The Appeal Board agreed to consider changing its ruling if MOE would clarify its policies regarding the open-ended liability imposed on mortgagees for the payment of cleanup costs. Supplementary reasons were issued in May 1997: see *Re: Karge* (1997), 23 CELR (N.S.) 299 (Ont. Env. Appeal Board) In its supplementary reasons, the EAB found that MOE must act fairly when making these types of orders. The mortgagee, Mr. Karge, is now appealing the EAB decision to the Divisional Court in an attempt to have it overturned.

injury and harm caused by the government's regulatory negligence.[26] Moreover, the lawyer for the plaintiffs, Rick Lindgren of the Canadian Environmental Law Association (CELA), invoked Part VI of the *EBR* in support of his client's action against the Crown. In this case, an Application for Investigation had not been submitted under the *EBR*. However, CELA was relying on ss. 84 (6) of the *EBR* which states that the requirement to request an investigation first does not apply where the delay involved would result in harm or serious risk of harm to a public resource.

The Notice of Claim states that more than 33,000 scrap tires were buried at the illegal dump. The burial of the tires was supervised by MOE staff. Over the past seven years the tires have been deteriorating and leaching contaminants into the local groundwater, which feeds the Braekers' well at their farm. The Notice of Claim states that MOE testing in 1994 revealed that the contaminants from the tires are toxic to fish and other aquatic life. Moreover, in 1994 a groundwater specialist at MOE recommended that the tires be removed. Three years later, MOE still was unwilling to act on the problem. Meanwhile, further testing done in 1997 found water at the site to be contaminated with chemicals in concentrations which greatly exceed levels permitted under the Provincial Water Quality Objectives (PWQOs).

In March 1998, the Minister of the Environment agreed to start removing the tires.[27] Work began in the summer of 1998. The tires will be recycled at a cost of $40,000 for use in an asphalt mix to be applied to roads in Grey County. However, the Braekers did not drop their action against the province.

As stated in the Registry notice, Percy James, a neighbour, has joined the Braeker family in the action. In addition to section 84 of the *EBR*, the plaintiffs are relying upon a number of other causes of action [including the common law causes such as trespass, nuisance, strict liability and negligence as well as spill liability (under Part X of the *Environmental Protection Act*), and contravention of a municipal by-law]. They are seeking the following relief:

1. A declaration that the defendants unlawfully caused, permitted, or failed to stop the actual or imminent contamination of the plaintiffs' properties by contaminants emanating from the illegal waste dump;

2. An interim and permanent injunction preventing the use of the property for any use other than rural uses;

3. A declaration or injunction requiring an environmental restoration plan to prevent,

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[26] Rick Lindgren, CELA, Letter to the Dianne Dougall, Director, Crown Law Office - Civil, Ministry of Attorney General, January 30, 1998.

[27] Roberta Avery, "Sterling Agrees to have buried tires removed," *Toronto Star,* March 17, 1998, p. A8.

diminish or eliminate harm to a public resource caused or likely to be caused by contaminants emanating from the waste dump and to restore the site to its prior condition; and

4. Damages in excess of $1 million.

In February 2000, ECO received a copy of MOE's Statement of Defence. In its defence, the MOE admitted to some allegations that the plaintiff made. The defendant (Ontario) acknowledged that in 1990, Mr. Karge (co-defendant) leased and later sold the waste dump property to Thomas Sanders and Patricia McPhee (carrying as 999720 Ontario Limited - co-defendant). The defendant (Ontario) also admitted in September 1990 that Mr. Karge advised Phil Bye (an agent of MOE) that scrap tires were deposited on the site. In addition the defendant also admitted that in June 1995, the Crown issued an order under the *EPA* which required Karge to unearth and remove the buried tires from the waste dump property.[28]

Along with the Statement of Defence, sections of Cross-Claim of Her Majesty the Queen in the Right of Ontario was included in their Statement of Defence. In the Cross-Claim the MOE claims if "became aware that more than 15, 000 tires had been illegally deposited at the property after it received a complain from the plaintiffs." [29]

MOE claimed that it "at all times acted diligently and within its statutory obligation in dealing with the tire site and with Sander's illegal actions."[30] In addition, MOE ordered Sanders and MacPhee to comply with the standards that were set out by law (i.e. *Environmental Protection Act*). Furthermore, MOE claimed it did not owe any duty to the plaintiffs. In the alternative, MOE claimed that if it owed a duty to the plaintiffs, the defendant took reasonable steps, in a timely and proper manner, to prevent the illegal deposit of tire at the disputed site. [31]

Currently, this court action is pending. The ECO will monitor this case and provide updates on the Registry and in future ECO annual reports to the Ontario Legislature.

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[28] Plaintiff's Statement of Claim paragraphs 13, 15, 32. Re: the Braeker et. al. v. Her Majesty the Queen in the Right of Ontario et. al.

[29] Defendants Statement of Defence and Cross-Claim of Her Majesty the Queen in the Right of Ontario paragraphs 4, 5, 6, 7, 8, 9, and 10. Re: the Braeker et. al. v. Her Majesty the Queen in the Right of Ontario et. al.

[30] *Ibid.*

[31] Defendants Statement of Defence and Cross-Claim of Her Majesty the Queen in the Right of Ontario paragraphs 52, 53 Re: the Braeker et. al. v. Her Majesty the Queen in the Right of Ontario et. al.

Brennan Case: Second Harm to Public Resource Lawsuit Under the *EBR*

In June 1999, Dr. John Brennan and Lynn Brennan initiated a harm to a public resource action against the Simcoe County District Health Unit (SCDHU). In the early spring of 1999, Brennan and a co-applicant had filed seven applications for investigation under the *EBR*. [32]

The plaintiffs are joint owners of property in Springwater Township, Simcoe County. The Board of Health for Simcoe County District Health Unit ("the defendant") is a public corporation responsible for community sanitation including the maintenance of sanitary conditions and the prevention and elimination of health hazards.

The plaintiffs issued a notice of action on June 16, 1999, maintaining that the defendant breached its duty of care to them and was negligent by issuing certificates of approval for sewage systems at two chalets at the Snow Valley ski resort although the sewage system designs were substandard and incapable of handling the intended loads on the systems.

The plaintiffs maintain that this breach has caused a nuisance and is polluting the plaintiffs' property. Specifically, the plaintiffs claim that:

1. their property has experienced significant increases in the levels of nitrates in their water supply;

2. the level of phosphates, coliform and other microorganisms in the ground and surface water on the plaintiffs' property has increased significantly;

3. the pollutants have caused the plaintiffs' well water supply and the ground water used by them and other landowners in the area to become unsafe for human consumption; and

4. the pollution to the groundwater has damaged the environment and has reduced the value of the plaintiffs' property.

The plaintiffs state in their notice of claim that they are relying on the following causes of action: negligence, nuisance, and public nuisance provisions, sections 84 and 103 of the *EBR*. The plaintiffs also plead and rely upon the provisions of the *Ontario Water Resources Act*, the

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[32] Brennan and his co-applicant are concerned about sewage systems being used by Snow Valley Ski Resort. In one application, they allege that the Simcoe County District Health Unit permitted sewage systems at the Snow Valley Ski Resort which created an attenuation area containing cold water fish habitat. The applicants also allege that a consulting firm performed inaccurate calculations regarding nitrate attenuation zones which resulted in approval of a sub-standard septic system. The MOE refused to undertake an investigation.

Environmental Protection Act, the *Health Promotion and Protection Act*, and their regulations as amended.

The plaintiffs claim full compensation for their losses from the defendant, together with prejudgment and post-judgment interest and costs on a solicitor and client scale. On July 16, 1999, the plaintiffs issued a statement of claim setting out further details of the action. The defendants filed a statement of defence on September 13, 1999, denying all of the plaintiff's allegations.

In November 1999, the ECO a received a letter from the counsel for the defence. The defendant (Board of Health for the Simcoe County District Health Unit) states that in 1990 the ski resort applied for a replacement sewage disposal system because the existing system was malfunctioning. The defendant also states that the local pond was tested and no contamination found. In addition, the defendant's decision was based on the studies that were provided by the ski resort engineers.

Furthermore, the defendants claimed they would not normally monitor the use of sewage disposal facilities that were previously approved unless the facilities were malfunctioning.[33]

Currently, the action in this case is pending. This has not yet been posted on the Registry, pending court approval of notice of the action under s. 84 of the *EBR*.

This is the first time that an applicant for an *EBR* investigation has decided to launch a public resource action under s. 84 of the *EBR*. Based on the documents filed to date, it is unclear whether Dr. Brennan is alleging the *EBR* investigation by the ministries (MOE and MNR) was inadequate.

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[33] Defendants Statement of Defence paragraphs 7, 10, 11. Re: Brennan v. Simcoe County and District Health Unit.

3. Public Nuisance Provisions

The *EBR* also affords greater access to the courts for public nuisance suits that can result in damage, under section 103 of the *EBR*.[34] Before the *EBR* was passed, individuals had limited access to the courts when it came to public nuisance activities harming the environment.[35] Now any person who experiences direct economic or personal loss because of a public nuisance causing environmental harm may sue for damages or other personal remedies. (There is an exception for farmers, who may be protected against public nuisance lawsuits relating to odour, noise and dust under the *Farming and Food Production Protection Act).*[36]

A public nuisance has been defined by one of the leading experts on tort law in the following terms:

> ... a nuisance which is so widespread in its range or so indiscriminate in its effect that it would not be reasonable to expect one person to take proceedings on his own responsibility to put a stop to it, but that it should be taken on as the responsibility of the community at large.[37]

Generally the courts have held that a problem affecting a number of properties and families will qualify as a public nuisance.[38] In one case, a noise problem at a speedway affecting seven or

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[34] *Environmental Bill of Rights*, S.O. 1993, c.28, s. 103. Section 103 provides the following:

> (1) No person who has suffered or may suffer a direct economic loss or direct personal injury as a result of a public nuisance that caused harm to the environment shall be barred from bringing an action without the consent of the Attorney General in respect of the loss or injury only because the person has suffered or may suffer direct economic loss or direct personal injury of the same kind or to the same degree as other persons.

[35] For an excellent summary of public nuisance law in Canada, see Mario Faieta et al., *Environmental Harm: Civil Actions and Compensation.* (Toronto: Butterworths, 1996); pp. 43-64.

[36] *Environmental Bill of Rights*, S.O. 1993, c.28, s. 103(2).

[37] A. Linden, *Canadian Tort Law*, 4th Ed. (Toronto: Butterworths, 1988) at p. 493.

[38] In *Attorney-General* v. *P.Y.A. Quarries*, [1957] 2 Q.B. 169 (CA), Romer L.J. stated:

> ...any nuisance is "public" which materially affects the reasonable comfort and convenience of life of a class of Her Majesty's subjects. The sphere of the nuisance may be described generally as "the neighborhood"; but the question whether the local community within that sphere comprises a sufficient number of persons to constitute a class of the public is a question of fact in every case. It is not necessary, in my judgment, to prove that every member of the class has been injuriously affected... (at p. 184).

more families was large enough to justify a public nuisance action.[39]

Section 103 of the *EBR* clarifies three of the ambiguous areas of an environmental law action in public nuisance: first, it eliminates the need for plaintiffs to get the Attorney General to take the case or to get the consent of the Attorney General to undertake a relator action[40]; second, it clarifies the nature of personal injuries that a plaintiff is required to prove; and third, it specifies that the person does not have to suffer unique economic damages or personal injuries.

Prior to the *EBR*, the ability of an individual in Ontario to sue if a public nuisance harmed the environment was limited, as he or she could sue only if certain conditions were met. These were based on common law rules that the courts had developed over time. These common law rules still apply in relation to public nuisance actions outside Ontario.

For example, in a 1934 case called *Fillion* v. *New Brunswick International Paper Company*, the Supreme Court of Canada ruled that to bring a successful public nuisance action, the plaintiff must prove that the damage caused outweighs the public utility of the act causing the damage.[41]

Later he states:

> Some public nuisances (for example, the pollution of rivers) can often be established without the necessity of calling a number of individual complainants as witnesses. In general, however, a public nuisance is proved by the cumulative effect which it is shown to have had on people living within its sphere of influence. In other words, a normal and legitimate way of proving a public nuisance is to prove a sufficeiently large collection of private nuisances. (at p. 187)

[39] *British Columbia (Attorney General) v. Haney Speedways Ltd.* (1963), 39 D.L.R. (2d) 48 (B.C.S.C.).

[40] As Faieta *et al.*, supra note 56, points out at 55, these are uncommon today. For a recent example, see *Manitoba (Attorney General)* v. *Flight Adventure Centres Ltd.* (1983), 22 Man. R. (2d) 142 (Q.B.). This action was brought in the name of the Attorney General by the Rural Municipality of Tache as relator.

[41] *Fillion* v. *New Brunswick International Paper Company* [1934], 3 D.L.R. 22, 8 M.P.R. 89 (S.C.C.). In the case, the plaintiff, a commercial fisherman, complained the defendant's mill polluted the waters of Restigouche River, where the plaintiff conducted his fishing operation. He claimed the resulting interference caused $2800 in damages. The court ruled the licences granted to the plaintiff did not give him the exclusive right to fish in any particular part of the river. Therefore, he was considered a member of the general public. Furthermore, because he did not own the dead fish, the damage suffered by Fillion, in comparison to the rest of the community, was merely in degree, not in kind. Because there was no difference in the quality of damage, the action was dismissed. The court also held that the proper person to bring such a case was the Attorney General, based on the information of a plaintiff.

Another important case, *Hickey* v. *Electric Reduction Company. of Canada Ltd.*,[42] had a similar result. In this case, Hickey, a commercial fisherman, alleged the defendant company discharged poisonous material into Placentia Bay, Newfoundland, poisoning the fish and rendering them of no commercial value. The court found that the damage was not peculiar to the plaintiffs, and ruled that the discharge was a public nuisance. It was not enough for the plaintiffs to show that their business was interrupted or interfered with, by the public nuisance.[43] The *EBR* should eliminate this problem for Ontario plaintiffs, as it states that direct economic losses are recoverable. This provides a fundamental tool in environmental law, as it allows citizens to hold corporations accountable for all types of damage and the consequences of that damage stemming from public nuisance harm to the environment.

In summary, to sue in public nuisance in most parts of Canada you have to: 1) show special damages, which is often hard to do; or 2) secure an agreement with the Attorney General of Canada or a provincial Attorney General to take on your case; or 3) get permission from the Attorney General of Canada or a provincial Attorney General to undertake a relator action.

The *EBR* should provide an effective new cause of action for Ontario plaintiffs because it eliminates some of the confusing common law rules on public nuisance.

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[42] *Hickey* v. *Electric Reduction Company of Canada Ltd*, (1970) 21 D.L.R. (3d) (S.C. Nfld) at 369. The defence argued the damages claimed were too remote in law. The court ruled economic loss without direct damage is not usually recoverable by law. Thus, the Hickey case indicated that interference with business from public nuisance does not constitute a direct damage and therefore does not meet the special damage requirement necessary to maintain a private cause of action. Therefore, economic losses could not be recovered.

[43] *Ibid.*

Hollick Case: The First Public Nuisance Case Filed

In February 1997 the first public nuisance case relying on section 103 of the *EBR* was filed in the Ontario Court of Justice in Whitby on behalf of 30,000 residents in Maple and Richmond Hill by the Toronto law firm McGowan and Associates. These residents were suing the City of Toronto on the grounds that odours, noxious gas, debris and noise emanated from the landfill since it began operations in 1983 and these emissions have caused harm to local residents.

This action commenced as a class action suit under the *Class Proceedings Act.*[44] Class action suits have been possible since 1993 when the *Class Proceedings Act* was proclaimed by the Ontario government.[45] In the Keele Valley suit, Toronto faced a $600 million claim, $500 million in compensatory damages and $100 million in punitive damages. In addition, the plaintiffs were seeking an injunction preventing Toronto from continuing to pollute the local environment.

On March 31, 1998, an Ontario Court (General Division) judge, John Jenkins, ruled that this class action suit could proceed. However, the court rejected a request for an injunction to close the facility and suggested that a more appropriate remedy would be for the plaintiffs to apply to ask a court to set aside the C of A.[46]

The City of Toronto has appealed the decision to the Divisional Court. On December 17, 1998, the City of Toronto was successful with its appeal. The plaintiff then appealed to the Ontario Court of Appeal (OCA). On December 16, 1999, the plaintiff's appeal was dismissed by the OCA. The OCA held that there was "no common issue to justify the certification as a class action because the individual's lives have been affected, or not affected, in a different manner and degree."[47]

Currently, the plaintiff is now proceeding with an appeal to the Supreme Court of Canada.

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[44] S.O. 1992, c. 6.

[45] Under the legislation, the suits must be certified appropriate by the court. If the action meets the test, notices are published and people potentially identified as class members may identify themselves to the plaintiff lawyer, or, for any reason, opt out of the class.

[46] "Landfill suit can proceed," *Toronto Star*, April 1, 1998, p. B2.

[47] Hollick v. Metropolitan Toronto (Municipality) (1999), 32 C.E.L.R.(N.S.)1 (O.C.A.).

Shirley Grace Case: Second Public Nuisance Action

In August 1997, Shirley Grace began a class action proceeding against the Town of Fort Erie, her local municipality, which operates a municipal water system, and the Regional Municipality of Niagara, which owns and operates the water treatment plant that supplies Fort Erie's water system.

Grace alleged that the water supplied to residents is frequently contaminated by iron rust and is also contaminated by microorganisms present at levels that exceed the Ontario Drinking Water Objectives and the Guidelines for Canadian Drinking Water Quality. She also claimed that the contaminated water is a nuisance and relied on s. 103 of the *EBR* on that ground. In addition, Grace claimed that the defendants are liable for trespass, breach of contract, negligence, negligent misrepresentation and for loss or damage under s. 99 of the *Environmental Protection Act.* She was seeking $30 million in damages on behalf of the class of residents and an injunction preventing the defendants from adding corrosion inhibitors to the water they supply.

According to ECO records from August 1999, the action is still pending. In 1998, a motion was made by the plaintiff seeking a Certification for the Class Proceeding. At the same time, the defendants made a motion seeking summary judgment. The defendant argued that there was an insufficient factual basis for the proceeding. Both of these motions were supposed to be heard in Hamilton in the fall of 1999. However, an injury suffered by the plaintiff's counsel resulted in a delay of the proceedings.

Posting Public Nuisance Action on the Environmental Registry

Although there is no requirement for posting public nuisance actions on the Registry, the ECO has an agreement with MOE to post notices of these actions on the Registry.[48] The ECO also maintains files on these actions, because the Commissioner has a duty to report to the Ontario Legislature each year on how s. 103 of the *EBR* is used by the public. Thus, we appreciate receiving information about use of these provisions in other cases. The ECO also is monitoring these landmark cases and will report on developments in future issues of the ECO's newsletter, EBRights, and future annual reports. In addition, the ECO, with the cooperation of the MOE, has posted information about these actions on the Registry.

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[48] If there is a public nuisance action, the ECO normally posts a notice of it within a few days after receiving the statement of claim.

APPENDIX I (Amendments to the Dombind Order)

Requirements and Conditions for the Application of Dombind Dust Suppressant

NOTE: Those applying Dombind are required to adhere strictly to the Order, its Appendices and User's Guide and are advised that repeated or serious violation of the rules and procedures for the application of Dombind will normally result in the Director taking steps to prohibit the municipality or other user from further use of Dombind.

11. Where Dombind dust suppressant is applied by an independent contractor, the application will be conducted in accordance with a written agreement between the applicator and the responsible owner who contracted for the dust suppression to be carried out. A copy of the written agreement shall be carried at all times during the application of the dust suppressant.

12. Dombind, mixed or blended with wastes, shall not be applied without a Certificate of Approval under Section 27 of the *Environmental Protection Act.*

13. Any Dombind containing greater than 5 parts per million (ppm) of polychlorinated biphenyls (PCBs) shall not be applied as a dust suppressant.

14. Dombind shall not be applied to any point which is within 50 metres of any water including a spring, lake, pond, reservoir, marsh, bog, fen or area of standing water) or watercourse (including an artificial watercourse and an intermittent watercourse) where "watercourse" is defined as "a stream of water which flows along a defined channel, with beds and banks, for a sufficient time to give it substantial existence and includes streams that dry up periodically".

15. Dombind shall not be applied to any point that is within a minimum of 15 metres of a water well.

16. Dombind shall not be applied in such a manner that could result in its deposit, either directly or indirectly, into waters frequented by fish.

17. Dombind shall not be applied to a road until the areas where Dombind may or may not be applied have been marked on an accurate large scale map (at least 1:50,000) of that road. Maps of all roads on which Dombind is to be applied must be made publicly available according to the terms set out below, at least 1 week prior to Dombind being applied on those roads.

18. The maps of where Dombind may or may not be applied shall be maintained by the municipality or other user for that area.

20. The maps shall be made available during regular business hours for perusal by the public at the offices of the municipality in which the Dombind is applied.

24. The Applicator of Dombind shall take appropriate steps prior to the application of Dombind to mark the areas on the road where the Dombind is to be applied and where it is not to be applied pursuant to the rules and procedures for the application of Dombind.

25. The municipality or contract applicator shall advise the Ministry of the Environment ("MOE") Dombind Inspector of the location of each Dombind application as soon as practicable, and in any event within 24 hours of the application.

26. Dombind shall be applied to a dust suppression site(s) at the minimal rate required to effectively suppress dust and the applicator must ensure that run-off does not occur from the application and that ponding does not result from an excessive application rate.

27. Dombind shall not be applied to a dust suppression site(s) during rainfall or snow events.

28. Dombind shall only be applied to dust suppression site(s) between April 15 and October 31 of any year.

29. The driver/applicator shall be trained in the following areas:

- the operation of the vehicle and application equipment;
- relevant environmental legislation and guidelines;
- major environmental concerns pertaining to the material to be handled;
- occupational health and safety concerns pertaining to the material to be handled; and
- emergency management procedures for the materials to be handled.

Other Relevant Information:

1. The Board denied a request by the Director and Norampac to extend the deadline for filing their responses to the applicants' submissions from June 23 to July 6, 1999. Both parties had already received a five-day extension, and the Board was not persuaded that the urgency for a further extension was established.

2. The Board denied a request by Norampac to cross-examine the applicants and hold an oral hearing on the leave to appeal application. The Board noted that the leave to appeal process contemplated by the *Environmental Bill of Rights* is summary in nature. Ontario Regulation 73/94 contemplates an application for leave to appeal to be made and disposed of wholly in writing, except to the extent that the appellate body directs otherwise. In the Board's view, Norampac failed to demonstrate that there was a need to cross-examine the applicants and that the Board should hold an oral hearing at the leave to appeal stage in

this case.

3. The Board ordered that the automatic stay on the Director's Order created by section 42 of the *EBR* be lifted, allowing the company to continue to conduct its operations according to the terms of the Order, subject to the condition that all applications of Dombind be prohibited within 50 metres of all waters and watercourses, as defined in the Order and Users' Guide.